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83279

358 - 21755

ANDREW LARSEN,

Plaintiff in Error,

vs.

ADOLPH BASIKOWSKI, (also known as A.
SMITH), ELIZABETH BASIKOWSKI, (also
known as Mrs. A. SMITH), and S. SING-
DAHLSEN,

Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

EXHIBIT 1

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

Andrew Larsen brought suit against Adolph
and Elizabeth Basikowski and S. Singdahlsen to recover
\$296.22 for materials furnished and labor performed in
constructing certain improvements on real estate located
in Chicago.

The evidence discloses that the defendants,
Adolph and Elizabeth Basikowski, were the joint owners
of the real estate on which the improvements were made;
that they let a contract to the defendant Singdahlsen
for the construction of the improvements; that Singdahlsen
afterwards sub-let a part of the work to plaintiff, who
started work October 24, 1914; that in accordance with
his contract plaintiff furnished labor and materials, and
the work was finished November 24, 1914; that the con-
tract price of said work and the reasonable value thereof
was \$291.37, which was due and owing from the defendant
Singdahlsen to plaintiff; that the owners of the premises

paid the original contractor Singdahlsen for the work according to his contract without obtaining from him a statement in writing under oath of the names of the parties furnishing material and labor on the building. The defendant Singdahlsen having failed to pay the plaintiff, the latter served two notices of his lien on the owners of the premises, one on December 2, 1914, and another on or about January 18, 1915, both notices being within sixty days after the completion of the work.

The owners of the premises denied that any such notice had been served upon them. The court however found that the notice had been served, but held that plaintiff was entitled to recover only the amount paid to the original contractor after the service of the notice on them by the plaintiff; and as \$100 had been paid to the original contractor after the plaintiff had served his notice of mechanic's lien, judgment was entered in favor of plaintiff for this amount. To reverse this judgment plaintiff has sued out this writ of error. Defendants in error have filed no brief in this court.

By section 21 of the Mechanic's Lien Act, plaintiff, the subcontractor was given a lien on the property improved by him, for the value of the materials furnished and services performed. Section 24 provides that subcontractors or parties furnishing labor or materials may at any time after making his contract with the contractor, and shall within sixty days after the completion thereof, cause a written notice of his claim to be personally served upon the owner or his agent. Section 5 makes it the duty of the contractor to give to the owner, and the duty of the

1990-1991 Conference Report

...and the ...

[illegible]

owner to require of the contractor, before the owner makes any payment, a statement in writing under oath, of the names of all parties furnishing materials and labor, and the amounts due or to become due to each. Section 32 provides that no payments to the contractor shall be regarded as rightfully made as against the subcontractors furnishing labor and materials, if made by the owner without obtaining from the contractor a statement in writing under oath, as provided in section 5. The owners of the premises having made payments to the original contractor without securing the verified statement provided for in section 5, are not relieved from paying the subcontractor. American Radiator Co. v. Blakie, 165 Ill. App. 404; Mueller Lumber Co. v. Bollinger, 160 Ill. App. 402.

Section 23 provides that the judgment shall recite the date from which the lien attached. Section 1 provides that the lien shall attach from the date of the contract. In the case of Zechman v. Feigenbaum, 163 Ill. App. 366, it was held that the failure to recite the date from which the lien attached in the judgment was reversible error. Section 21 provides that the subcontractor "shall have a lien for the value thereof with interest on such amount from the date the same is due."

The evidence shows that plaintiff entered into the contract October 24, 1914; that his work was completed November 24, 1914. We are therefore of the opinion that he was entitled to recover for the materials furnished and labor performed amounting to \$291.37 with interest thereon from the time this became due, November 24, 1914, at the rate of five per cent per annum, and that the lien attached from

owner to require of the contractor, before the owner makes any payment, a statement in writing under oath, of the nature of all parties furnishing materials and labor, and the amount due or to become due to each. Section 24 provides that no payments to the contractor shall be required or rightfully made as against the subcontractors furnish and labor and materials, if made by the owner without obtaining from the contractor a statement in writing under oath, as provided in section 24. The owner of the property having made payments to the original contractor without procuring the verified statement provided for in section 24, and not receiving from paying the subcontractors, George and William Co. v. Hinkle, 100 Ill. App. 444; Hinkle v. George and William Co. v. Hinkle, 100 Ill. App. 444.

Section 25 provides that the judgment shall recite the date from which the lien attached. Section 1 provides that the lien shall attach from the date of the contract. In the case of George v. Hinkle, 100 Ill. App. 444, it was held that the failure to recite the date from which the lien attached in the judgment was not a reversible error. Section 21 provides that the subcontractor "shall have a lien for the value of the work done and materials furnished from the date the same is due."

The evidence shows that plaintiff's work was performed between October 24, 1914; that the work was completed between December 24, 1914. We are therefore of the opinion that he was entitled to recover for the materials furnished and labor performed between October 24, 1914 with interest thereon from the time this action was brought, November 24, 1914, at the rate of five per cent per annum, and that the lien attached from

the date of his contract, October 24, 1914.

The judgment of the Municipal Court must be reversed, but as all the facts are before us, the cause will not be remanded, but judgment will be entered in this court in favor of the plaintiff for the amount due, \$291.37, with interest thereon at five per cent per annum from November 24, 1914, and that said lien attached as of October 24, 1914.

JUDGMENT REVERSED AND JUDGMENT
IN THIS COURT.

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634 - 22032

WERNER BROTHERS EXPRESS &
STORAGE COMPANY and NATIONAL
LIFE INSURANCE CO. of U.S.A.,

Appellants,

vs.

JAMES DONOVAN and CLARA H.
WOODWARD,

Appellees.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

206 I.A. 11

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

By this appeal Werner Brothers Express & Storage
Company and National Life Insurance Co. of U. S. A. seek
to reverse a decree of the Superior Court of Cook County,
dismissing the original bill of the Storage Company and
the cross-bill of the Insurance Company and granting the
prayer of the cross-bill of Clara H. Woodward.

The facts, so far as material, are as follows:
Appellee James Donovan borrowed money from the Insurance
Company and secured the same by a mortgage on improved
real estate in Chicago. Default being made by Donovan,
the Insurance Company obtained a decree of foreclosure,
from which Donovan prosecuted an appeal to this court,
where the decree was affirmed (National Life Insurance
Co. v. Donovan, Gen. No. 14090, Appellate Court, First
Dist.) and a further appeal was prosecuted to the Supreme
Court where the judgment of this court was affirmed.
National Life Insurance Co. v. Donovan, 238 Ill. 283.
Afterwards the property was sold in accordance with the

WERNER BROTHERS EXPRESS &
STORAGE COMPANY and NATIONAL
LIFE INSURANCE CO. of U.S.A.,

Appellants,

SUPERIOR COURT,

COOK COUNTY.

vs.

JAMES DONOVAN and CLARA H.
WOODWARD,

Appellees.

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opinion of the court.

By this appeal Werner Brothers Express & Storage Company and National Life Insurance Co. of U. S. A. seek to reverse a decree of the Superior Court of Cook County, dismissing the original bill of the Storage Company and the cross-bill of the Insurance Company and granting the prayer of the cross-bill of Clara H. Woodward.

The facts, so far as material, are as follows:

Appellee James Donovan borrowed money from the Insurance Company and secured the same by a mortgage on improved real estate in Chicago. Default being made by Donovan, the Insurance Company obtained a decree of foreclosure, from which Donovan prosecuted an appeal to this court, where the decree was affirmed (National Life Insurance Co. v. Donovan, Gen. No. 14087, Appellate Court, First Dist.) and a further appeal was prosecuted to the Supreme Court where the judgment of this court was affirmed. National Life Insurance Co. v. Donovan, 238 Ill. 288. Afterwards the property was sold in accordance with the

decree and a master's deed issued to the Insurance Company. Prior to the sale, appellee James Donovan had leased the property to Nellie D. Driver, who conducted a boarding house. She fell behind in the payment of rent and Donovan levied a distress warrant on the furniture owned by Mrs. Driver for the unpaid rent amounting to \$4200. About a year prior to the levy Mrs. Driver executed a chattel mortgage on the furniture to secure the payment of \$1800 which she had borrowed from appellee Clara H. Woodward. Shortly after the levy by Donovan, Mrs. Driver went into bankruptcy, and the American Trust and Savings Bank was appointed trustee and took possession of the furniture. Afterwards an order was entered in the bankruptcy proceedings directing the trustee to turn the property back to Donovan. After the sale of the real estate under the foreclosure and during the period of redemption, Donovan leased the premises and furniture to Mrs. Mary Rooney, who took possession and conducted a boarding house on the premises. After Mrs. Driver had gone into bankruptcy, Mrs. Woodward, appellee, foreclosed the chattel mortgage on the furniture. Donovan was made a party to this suit and claimed a first lien. The trustee in bankruptcy was also made a party. The Circuit Court entered a decree of foreclosure awarding Mrs. Woodward a lien on the property superior to that claimed by Donovan. Donovan alone appealed to this court, where the decree of the Circuit Court was affirmed. Woodward v. Donovan, 167 Ill. App. 503. Before this affirmance, the Insurance Company obtained a master's deed to the real estate and demanded possession from the tenant, Mrs. Rooney. She asked time to consult her attorney, which was granted, and the next day the Insurance Company and Mrs. Rooney entered into a written lease for the premises

and Mrs. Rooney entered into a written lease for the premises which was granted, and the next day the Insurance Company tenant, Mrs. Rooney. She asked time to consult her attorney, lead to the real estate and demanded possession from the this affidavit, the Insurance Company obtained a master's affidavit. Woodward v. Donovan, 107 Ill. App. 603. Before to this court, where the decree of the Circuit Court was superior to that claimed by Donovan. Donovan alone appealed foreclosure awarding Mrs. Woodward a lien on the property also made a party. The Circuit Court entered a decree of and claimed a first lien. The trustee in bankruptcy was on the furniture. Donovan was made a party to this suit Mrs. Woodward, appellee, foreclosed the chattel mortgage premises. After Mrs. Driver had gone into bankruptcy, who took possession and conducted a boarding house on the leased the premises and furniture to Mrs. Mary Rooney, closure and during the period of redemption, Donovan Donovan. After the sale of the real estate under the fore- ing directing the trustee to turn the property back to Afterwards an order was entered in the bankruptcy proceed- appointed trustee and took possession of the furniture, bankruptcy, and the American Trust and Savings Bank was Shortly after a levy by Donovan, Mrs. Driver went into which she had borrowed from appellee Clara M. Woodward. mortgage on the furniture to secure the payment of \$1800 year prior to the levy Mrs. Driver executed a chattel driver for the unpaid rent amounting to \$4800. About a levied a distress warrant on the furniture owned by Mrs. house. She fell behind in the payment of rent and Donovan property to Nellie D. Driver, who conducted a boarding Prior to the sale, appellee James Donovan had leased the decree and a master's deed issued to the Insurance Company.

for one month, and shortly thereafter, September 10, 1910, another lease was entered into, which by its terms would expire April 30, 1911. This lease expressly excluded the furniture, and the Insurance Company expressly disclaimed any interest in it. The lease provided that it might be canceled upon thirty days notice. After the execution of the lease by Mrs. Rooney for the building, she entered into a separate arrangement for the use of the furniture with Donovan, paying him for the use thereof. On September 19, 1910, the Insurance Company entered into a written contract for the sale of the real estate, whereby it agreed to give possession on or before October 21, 1910. On October 20, 1910, a representative of the Insurance Company went to the premises and found two men in the house who had been there for a day or two, representing appellee Donovan, and claimed to be acting as custodians of the furniture, but made no claim to the real estate. The men were told that the Insurance Company had sold the property and possession must be delivered the following day, and therefore it was necessary that the furniture be removed. Donovan's representatives stated that the furniture must remain in the house. Thereupon, the Insurance Company notified Mrs. Woodward's attorneys that the real estate had been sold and possession must be delivered the next day and asked if they would remove and take charge of the furniture, which they refused to do. The Insurance Company then suggested putting the furniture in a barn on the premises, but counsel for Mrs. Woodward objected, stating that it was not a safe place. The Insurance Company then stated that it would store the furniture, and counsel for Mrs. Woodward replied that the responsibility for the removal must rest with the

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Insurance Company and not with Mrs. Woodward. The Insurance Company then secured the services of appellant Werner Brothers Express and Storage Company who removed the furniture to its warehouse. The removal of the furniture was completed about five o'clock in the morning of October 21st. The custodians representing Donovan, and also representatives of the Insurance Company remained in the premises until October 21st. On this date there was an altercation between Donovan and the representative of the Insurance Company, Donovan insisting that the furniture be returned to the premises at once, which was refused, and Donovan and his custodians were ordered from the premises and left under protest.

The Storage Company filed its bill praying that it be decreed to have a first lien on the furniture for its reasonable charges for removing and storing the furniture. Mrs. Woodward filed a cross-bill claiming a first lien, and Donovan also contends that he is entitled to a first lien on the furniture.

While the suit was pending, by agreement of the parties, a receiver was appointed and the property sold for \$1022.51. The receiver reported the sale to the court and after deducting the expense, there was a balance in his hands of \$726.26. This report was approved. The report disclosed that there was more than \$1500 still due Mrs. Woodward under her decree of foreclosure; that there was due Donovan for back rent more than \$4200, and that there was due the Storage Company for removal and storage of the furniture more than \$2000. The court decreed that neither of the parties had any claim to the funds in the hands of

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the receiver as against Mrs. Woodward.

Appellee Donovan contends that the decree is correct in all respects, except that he should have been given a lien on the proceeds in the hands of the receiver superior to the lien of Mrs. Woodward. This contention is obviously untenable, as this court has determined this contention adversely to him in the case of Donovan v. Woodward, supra.

Appellants contend that the Storage Company was entitled to a first lien for the reason that under the facts it was necessary that the furniture be taken care of so as to preserve it; that when it was removed from the premises, it was raining, and therefore it was necessary that the Insurance Company have the same stored; that the Insurance Company was in peaceable possession of the building through its tenant, Mrs. Rooney, for some time prior to the removal of the furniture; that it had terminated her lease by giving the notice required; that as there was no one claiming to be the owner of the furniture and neither of the two parties claiming a lien would remove the same, it was proper under the circumstances for the Insurance Company to remove the property and to store it. The evidence clearly shows that the Insurance Company was by its tenant in peaceable possession of the building; that it had terminated the tenant's lease, and she is in no way complaining; that the trustee in bankruptcy of Nellie D. Driver, the former owner of the furniture expressly disclaimed any interest in the furniture; that the representatives of Donovan knew that the furniture was to be removed, and after it was removed, appellee Donovan insisted that it be returned to the building; that appellee Woodward did not see fit to take the

the receiver as against Mrs. Woodward.

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responsibility of removing the furniture as to the question of the priority of ^{her}lien over that of Donovan's was then pending in this court. We are, therefore, of the opinion that the Insurance Company was justified in removing the furniture. Counsel for appellee Woodward states in his brief that while in some states of the union "a landlord may recover possession of the demised premises, when entitled to them without recourse to law, such is not the law in this state, unless the lease expressly provides for a forcible expulsion, with or without process of law."

In the case at bar, the lease does contain such a provision. It provides that the lease may be terminated by lapse of time or by giving thirty days notice, etc.; that if the lease is terminated, "it shall be lawful for the party of the first part (landlord) or the legal representative of said party at any time thereafter, at the election of said first party, or the legal representative thereof, * * * to re-enter said demised premises * * * with or without process of law, and the said party of the second part or any person or persons occupying the same, to expel, remove and put out, using such force as may be necessary so to do."

In the case of Turn Verein Garfield v. Vöcke, 131 Ill. App. 528, where furniture was removed under similar circumstances, the action of the landlord in removing the same was held justified.

The evidence tends to show that when the Insurance Company informed counsel for Mrs. Woodward that the

responsibility of removing the furniture as to the question of the priority of ^{her} lien over that of Donovan's was then pending in this court. We are, therefore, of the opinion that the Insurance Company was justified in removing the furniture. Counsel for appellee Woodward states in his brief that while in some states of the union "a landlord may recover possession of the premises, when entitled to them without recourse to law, such is not the law in this state, unless the lease expressly provides for a forcible expulsion, with or without process of law."

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In the case of John V. Vane v. V. V. V., 131 Ill. App. 528, where furniture was removed under similar circumstances, the action of the landlord in removing the same was held justified.

The evidence tends to show that when the Insurance Company informed counsel for Mrs. Woodward that the

furniture was about to be removed, her counsel insisted that if afterwards this court affirm the decree of foreclosure of the chattel mortgage in Mrs. Woodward's favor, he would expect that the Insurance Company would return the property to him. In the case of Storms v. Smith, 137 Mass. 301, the court held that where personal property subject to a mortgage was removed and stored in a warehouse, of which removal the mortgagee was notified and made no objection, that the mortgagee could recover the property without paying the storage charges. Under the facts in this case, as disclosed by the evidence, we are clearly of the opinion that it would be unjust and inequitable to require that the storage charges be paid to the Storage Company and thus deprive appellee Mrs. Woodward of her lien on the property, and this will be no hardship on the Storage Company, as it will have its claim under its contract against the Insurance Company.

The decree of the Superior Court of Cook County, in so far as it awards ~~awarding~~ Mrs. Woodward a first lien on the proceeds in the hands of the receiver is correct and is affirmed.

AFFIRMED.

Furniture was also to be removed, her counsel insisted that if afterwards this court should find the degree of force of the chattel mortgage in Mrs. Woodward's favor, he would expect that the Insurance Company would return the property to him. In the case of Storace v. Woodward, 137 Mass. 301, the court held that where property is hypothecated to a mortgagee and removed and stored in a warehouse, or which removal the mortgagee was notified and made no objection, that the mortgagee could recover the property without paying the storage charges. Under the facts in this case, as disclosed by the evidence, we are clearly of the opinion that it would be unjust and inadvisable to require that the storage charges be paid to the Storage Company and thus deprive appellee Mrs. Woodward of her lien on the property, and this will be no hardship on the Storage Company, as it will have its claim under its contract against the Insurance Company.

The degree of the question being one of fact, we will not say as it regards Mrs. Woodward a first lien on the proceeds in the hands of the receiver is correct and is affirmed.

ATTORNEYS.

641 - 22039

ROBINSON & CO.,
a corporation,

Appellee,

vs.

ANDREW MARR, Appeal of
CLAY, ROBINSON & CO.,
garnishees,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

2001A.12

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

By this appeal Clay, Robinson & Co., garnishees,
seek to reverse a judgment against them for \$2,179.39.
We regret to say that this case has been before this court
on three former occasions, 112 Ill. App. 332; 145 Ill.
App. 178; 181 Ill. App. 605, where the facts are set forth,
and it is therefore unnecessary to repeat them.

The principal controversy on the trial was
whether the money in the hands of the garnishees belonged
to the defendant Andrew Marr, or to other parties, the
plaintiff contending the former and the garnishees the
latter. The trial court found in favor of the plaintiff's
contention, and we think this finding is clearly justified
by the evidence. Plaintiff, to sustain his contention,
read in evidence two stipulations entered into between the
parties. Counsel for the garnishees complain that these
stipulations were improperly read in evidence. These
same stipulations were offered in evidence on the third
trial and excluded. This court held that such exclusion
was error. (181 Ill. App. 605-614). That their admission
was proper has therefore been determined by this court.

ROBINSON & CO.,
a corporation,

Appellant,

vs.

vs.

ANDREW BAY, Agent of
DAY, ROBINSON & CO.,
Respondent,

Appellee.

IN SENATE
JANUARY 11, 1911

MR. FRANCIS J. LORAN, delivered the

opinion of the court.

By this appeal Bay, Robinson & Co., petitioners,

seek to reverse a judgment against them for \$2,175.50.

We regret to say that this case has been before this court
on three former occasions, 121 Ill. App. 312; 122 Ill.

App. 178; 121 Ill. App. 608, where the facts are set forth,
and it is therefore unnecessary to repeat them.

The principal controversy on the trial was

whether the money in the hands of the petitioners belonged

to the respondent Andrew Bay, or to other parties, the

plaintiff contended the money was the property of the

latter. The trial court found in favor of the plaintiff's
contention, and we think this finding is well justified
by the evidence. Briefly, the facts are as follows:

Read in evidence the stipulations entered into between the
parties. Counsel for the petitioners desired that these

stipulations were properly read in evidence. These

same stipulations were offered in evidence on the third

trial and excluded. This court said that such exclusion

was error. (121 Ill. App. 312-314). That their admission

The garnishees also contend that it was erroneous to permit the plaintiff to read in evidence an interrogatory and answer of the garnishees thereto; that the issues were different from those involved in the first trial of the case in which the answer was made, in that the garnishees had filed a new answer. The first answer was verified by one of the garnishees and stated that the money belonged to Andrew Marr. The new answer was on information and belief and verified by counsel for the garnishees. This answer indicated that the money in the hands of the garnishee belonged to other parties than the defendant Andrew Marr. We think that the court properly admitted the answer of the garnishees to be read in evidence.

It is further contended that under the law the judgment creditor has no greater rights against the garnishees than the defendant, and that as the defendant Marr testified in a deposition that the money in the hands of the garnishees did not belong to him, but that it was the property of other persons, this would have estopped Marr to assert any claim against the garnishees, and for this reason would also estop the plaintiff. The record discloses that this testimony of Marr was excluded by the court, and it is manifest that the ruling was proper. This was the very issue to be decided by the trial judge and not by the witness. Furthermore it appears that each of these other parties who the garnishees claim were interested in the money in their hands were properly notified but entered no appearance and were defaulted. This concludes them. Radzinski v. Fry, 111 Ill. App. 645; sections 11 and 12, chapter 62, R. S.

The garnishees complain that the judgment is

erroneous in that it should have been for the amount found to be due from the garnishees to the defendant, while the judgment was only for the amount found due from the defendant to the plaintiffs, which was less than the amount due from the garnishees to the defendant. The evidence shows that after the writ was served on the garnishees they paid the entire amount in their hands to the defendant. They cannot therefore complain that the judgment entered against them was for the amount due to the garnisheeing creditor and not for the full amount originally due to the judgment debtor. The judgment was in proper form. L. S. & M. S. Ry. Co. v. Scott, 67 Ill. App. 92.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

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CV 111. App. 92.

The judgment of the ...

is affirmed.

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WESTERN IRON CO.,
a corporation,
In the Matter of a Petition of
JOEL C. CARLSON to Enforce
Attorney's Lien,

Defendant in Error,

vs.

JOHN J. BRITTAIN, et al,

Plaintiffs in Error)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

2061A 14

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

Joel C. Carlson filed his petition seeking
to enforce his attorney's lien against John J. Brittain
and Milton B. Bushnell, who were defendants in a suit
brought against them by the Western Iron Company, a
corporation. There was a judgment in favor of the peti-
tioner for \$175 against Milton B. Bushnell, to reverse
which this writ of error is prosecuted.

It appears that the Western Iron Company, by
its attorney the petitioner, brought suit against Brittain
and Bushnell in the Municipal Court. There was a judg-
ment in favor of the plaintiff and against the defendants.
Afterwards plaintiff's attorney, the petitioner, served
notice on the defendant Bushnell claiming an attorney's
lien in the sum of \$75. Subsequently another notice of
the same character was served on Bushnell in which the
petitioner claimed a lien for \$244.55. Each of these
notices were addressed to both defendants, but only
Bushnell was served. Defendants entered a special appear-

IN THE MATTER OF A PETITION
FOR THE REFORMATION OF THE
JURY IN THE CASE OF THE
ATTORNEY'S FIRM

Defendant in Error

77

JOHN J. GIBLIN, et al.

Plaintiff in Error

104 - 2004

THE COURT OF APPEALS IN THE SECOND DEPARTMENT

opinion of the court.

JOHN J. GIBLIN, et al. vs. JOHN J. GIBLIN, et al.

to enforce the contract of the plaintiff against the defendant.

and JOHN J. GIBLIN, et al. vs. JOHN J. GIBLIN, et al.

promised against them by the defendant in error.

corporation. There is a judgment in favor of the plaintiff.

either for GIBLIN, et al. or for JOHN J. GIBLIN, et al.

which this writ of error is presented.

It appears that the writ of error is presented by

its attorney the plaintiff, who has been appointed guardian

and who will be the principal party in the case.

most in favor of the plaintiff and against the defendant.

Attorneys plaintiff's attorney, the plaintiff's attorney,

notice of the defendant's attorney, the defendant's attorney,

lies in the fact that the plaintiff's attorney has been

the same character as the defendant's attorney in that the

petitioner claimed a judgment for \$10,000. Each of these

relief was asked and it is to be noted that only

judgment was asked. Defendant's attorney, the plaintiff's attorney,

ance and moved to dismiss, which was overruled. They then filed their answer and the matter came on for hearing before the court. It was expressly stipulated between the parties that the only questions to be decided were the amount of petitioner's fees and whether he was entitled to an attorney's lien for services rendered by him to the plaintiff in other cases prior to the time he rendered services in this case. The court held that he was not entitled to a lien for services rendered in other cases. Therefore the only questions that can be raised in this court are: (1) the jurisdiction of the trial court to hear and determine the matter, and (2) the amount of petitioner's fees in this case. Other questions, however, are urged, but on account of the stipulation, they are not properly before us.

The defendant contends that the court was without jurisdiction of the defendants, for the reason that the judgment had been paid and satisfied prior to the filing of the petition; that unless proceedings are pending at the time the petition is filed, jurisdiction of the defendants cannot be obtained unless summons is issued and served upon them. This question was waived by the defendants by filing their answer and contesting the case on its merits. If the defendant desired to preserve this question, he should have stood on his special appearance.

Defendant next contends that the judgment is excessive; that in no event should it exceed \$75. It appears from the evidence that after the notices of lien were served on the defendant, the judgment was paid and \$75 reserved and tendered to petitioner and a receipt in full demanded. The evi-

dence further shows that in addition to the \$75, the petitioner claims attorney's fees for services rendered after the procuring of the judgment; that his charge of \$75 was the amount he claimed for obtaining the judgment; that after the judgment was entered, the defendants filed a stay bond which stayed the execution on the judgment for ninety days; that during this period the petitioner at the request of plaintiff performed services in endeavoring to secure payment of the judgment; that after the expiration of the ninety days, and before the payment of the judgment, other services were rendered by the petitioner with the same object in view. It is contended by the defendant that the services rendered by the petitioner during the ninety day period should not have been rendered, as execution on the judgment could not be enforced, and therefore they were of no value. We cannot concur in this view. It might well be that after the stay bond was filed services might properly be rendered by the petitioner looking toward the payment of the judgment, other than obtaining execution or taking other legal steps. We, however, are of the opinion that a great part of the services testified to by the petitioner are such that recovery could not be had for them. But even if no allowance were made for a great part of the services which he rendered during this period of time, yet the judgment would not be excessive for the services which were properly rendered. In this view of the case, it will be unnecessary for us to pass upon the motion made by the petitioner to strike the stenographic report from the record.

The judgment of the Municipal Court of Chicago is affirmed.

dence further shows that in addition to the 50,000, the
petitioner claims that, after the services rendered
after the rendering of the judgment, the petitioner
did not the same as before the judgment, the petitioner
that after the judgment was entered, the petitioner
a stay bond which stayed the execution of the judgment for
ninety days; that during this period the petitioner at the
request of plaintiff paid the services in undergoing the
secure payment of the judgment; that after the execution
of the ninety days, and before the expiration of the judg-
ment, other services were rendered by the petitioner at the
same object in view. It is contended by the defendant
that the services rendered by the petitioner during the time
of the judgment should not have been rendered, as execution
on the judgment would not be necessary, and accordingly
were of no value. It cannot be seen from the view of the
well be that after the stay bond was filed services were
properly be rendered by the petitioner looking toward the
payment of the judgment, other than obtaining execution
or taking other legal steps. It, however, one of the con-
dition that a great part of the services rendered to by the
petitioner was such that recovery could not be had for
them. But even if no allowance were made for a great part
of the services which he rendered during this period of
time, yet the judgment would not be excessive for the
services which were properly rendered. In such view of
the case, it will be unnecessary for us to even reach the
action made by the petitioner to state the circumstances
report from the record.

129 - 22072

MARIAN S. LINDEM,

Defendant in Error,

vs.

KATHARINA SAUERLAND,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

2003-15

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Marian S. Lindem brought suit in the Municipal Court of Chicago against Katharina Sauerland to recover \$412.80 with interest thereon. The case was tried before the court without a jury and a judgment entered in favor of the plaintiff for \$425.18, to reverse which this writ of error is prosecuted.

It appears that plaintiff had performed services and loaned money to Christian Eckel, brother of the defendant; that afterwards said Eckel died testate, and the defendant was appointed executrix of his estate; that one Richard H. S. Miller, an attorney at law, represented the defendant individually and as executrix; that plaintiff had a claim against the estate for \$1,000 and spoke to Miller about it. Plaintiff testified that she went to Miller's office and told him she had asked the defendant for the money; that thereupon Miller stated that if plaintiff would pay him ten per cent as a commission he would collect the \$1,000; that plaintiff complained about the amount of the charge and Miller told her it was the regular

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collection fee, and thereupon plaintiff said she would draw only \$500. Miller thereupon prepared a written memorandum dated December 19, 1913 and signed by himself and plaintiff, which provided that he was to collect the "sum due Miss Lindem from Eckel estate and Miss Lindem to pay as fee for services a sum equal to 10 (ten) per cent. This agreement is made subject to the approval of Mrs. Sauerland executrix of estate." A few days afterwards, plaintiff again called on Miller at his office, and he gave her \$500, stating that he collected \$555.55 and deducted \$55.55 for his fee. She further testified that she only employed Miller to collect this \$500 and not the balance.

Upon payment of this \$500 a written agreement dated December 22, 1913, was entered into between plaintiff and defendant. This agreement provided, inter alia, that the defendant individually would pay plaintiff \$1,000 in full of all claims plaintiff had against the defendant or the estate; recited the payment of the \$555.55 and stated there was a balance due of \$412.30. Plaintiff's suit is based on this written agreement.

The affidavit of defense admits the execution of the contract; that the defendant was ready, able and willing to pay the sum mentioned, but alleges that there were certain counter claims which the defendant individually and as executrix had against the plaintiff; that plaintiff had during the lifetime of Christian Eckel taken chattels belonging to him, the value of which defendant sought to set off; that the amount of this set-off was agreed upon between the parties and afterwards defendant paid Miller, as attorney for the plaintiff, the balance in full and received a receipt therefor.

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After the case was called for trial Miller stated to the court that he was only a witness in the case and that the attorney for the defendant was engaged before the Industrial Board and moved for a postponement. This was after the parties had announced that they were ready for trial. The court overruled the motion and Miller acted as attorney for the defendant and testified in the case in her behalf.

He testified in substance that plaintiff spoke to him a number of times in Winnetka about her claim for \$1,000; that afterwards plaintiff called at his office and asked him to look after the matter for her, which he refused to do, "telling her that there was a diversity of interest and that I could not represent her as well as my client;" that she then offered him ten per cent of the amount collected; that afterwards he talked to the defendant and explained to her that plaintiff was anxious to obtain some of the money before the matter was adjusted in the Probate Court, and stated that if the defendant would make a payment he would refund to her one-half of his fee; that he then collected \$555.55, took out ten per cent and gave one-half of the same to the defendant. He further testified that shortly after this payment plaintiff went to Wisconsin; that he wrote her on many occasions urging her to come in and get her money; that he received replies from the plaintiff stating that she was unable to return; that more than a year afterwards when plaintiff did return she called at his office, and he discussed the matter with her for about three hours; that he told her she had some personal property which belonged to Christian Eckel in his lifetime, for which

After it was way up to him if he
to the court that he was not a witness in the case.
case was necessary for the defendant to be able to
Industrial Board and was a witness in the case.
after the parties had been heard and the court
trial. The court overruled the motion and the case
an attorney for the defendant was a witness in the case
in her behalf.

He testified in the case that she had
to him a number of times in the office and that she
\$1,000; that she had been paid for her services in the
asked him to look after the case for her, which he
found to be, "saying her case was a difficulty of
Industrial Board and that I could not represent her in the
no clients; that she then came to him for part of the
amount collected; that afterwards he failed to collect the
and explained to her that his salary was not to be
some of the money before the matter was adjusted in the
Probate Court, and stated that all the defendant's money was
a payment he would return to her one-half of it; that
he then collected \$500.00, took out the money and gave
one-half of the same to the defendant, and the other half
that shortly after the payment, the defendant wrote to him
that he wrote her in some occasion when he was in
and get her money; that he then collected the money
till sitting there and was in a room; that when
a year afterwards when she was at the court he
his office, and he discussed the matter with her in
three years; that he paid her the money in several parts
which belonged to the defendant in the case, for which

some deduction should be made, and that finally a satisfactory agreement was reached whereby certain deductions were made; that afterwards he saw the defendant and told her of the arrangements he had made with the plaintiff, and after deducting the amounts agreed upon, he received the balance of \$383.99 and gave the defendant a receipt in full as agent of the plaintiff.

The defendant contends that under the written agreement made by Miller and plaintiff December 19, 1913, Miller was authorized to collect plaintiff's claim in her behalf; that "if the agreement between plaintiff and Miller is sufficient to constitute Miller the plaintiff's agent to make the collection, there is an end to the case," as Miller has collected the balance and receipted in full.

There is no evidence in the record that Miller ever turned over to the plaintiff the balance of the claim which he claims to have collected as her agent. The uncontradicted evidence is that Miller, an attorney at law, was at all times representing the defendant, individually and as executrix of the estate; that he divided the fees which he received from the plaintiff with the defendant; that after the first payment was made to him of \$555.55 he drew a contract upon which this suit is based, wherein it was stated that there was a balance due of \$412.80; that after the plaintiff went to Wisconsin he repeatedly wrote her requesting her to come in and receive her money, and yet, when she finally did come in a year later, in place of giving her the money, he sought to set off counter claims for matters which were in existence in the lifetime of the deceased and long before the contract on which this

some deduction and to be paid by the Government. The
Laboratory agreement was renewed whereby certain deductions
were made; this agreement was not renewed and the
Laboratory of the Government was not renewed and the
and after deducting the amount of the deduction, the
the balance of \$250.00 was paid to the Government and a
in full on behalf of the Laboratory.

as Miller has indicated the balance was received in full. Agent to make the collection, there is no end to the case." Miller is unwilling to contribute. After the collection, Miller; that all the agreement between the parties and the agreement made by Miller and the estate in 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2

There is no evidence in the record that Miller ever turned over to the plaintiff the balance of the claim which he claims to have collected as set forth. The undisputed evidence is that Miller, an attorney at law, was at all times representing the defendant, individually and as executor of the estate; that he obtained the funds which he received from the plaintiff with the understanding that after the final payment was made to him of \$2500.00 he drew a contract upon which this sum is based, wherein it was stated that there was a balance due of \$2500.00. Thereafter the plaintiff sent to him a check for \$2500.00, which he represented that he was to give her money, and yet, when the check finally did come in, he made no use of giving her the money, he secured a set off on other claims for matters which were in existence at the time of the deceased and paid the set off to himself. He then this

suit was brought was prepared by him. It clearly appears from Miller's own testimony that he was not representing the interests of the plaintiff but that he was directly representing the interests opposed to her claim; and under every principle of law and legal ethics he was prohibited from representing plaintiff in the matter. Attorneys at law cannot accept employment from adverse litigants at the same time and in the same controversy. Gary v. Beadles, Gen. No. 21293, Appellate Court, First Dist.; Strong v. International Investment Union, 183 Ill. 97; People v. Gerold, 265 Ill. 488.

It follows, therefore, that the receipt which Miller testifies he gave to the defendant in full of plaintiff's claim, is of no binding effect on the plaintiff; and as there is no evidence that Miller ever turned over to plaintiff the balance which he claims to have collected, plaintiff is entitled to recover.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

42 43

[illegible]

147 - 22095

CHARLES B. TRAVIS,

Defendant in Error.

vs.

GEORGE F. LEIBRANDT,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Charles B. Travis brought suit in the Municipal Court against George F. Leibrandt and the Lincoln State Bank of Chicago, a corporation, to recover \$111. The case was tried before the court without a jury, and after evidence was introduced plaintiff dismissed as to the bank, and there was a finding and judgment against Leibrandt for the amount of plaintiff's claim, to reverse which he prosecutes this writ of error.

The record discloses that plaintiff was in the commission business, and that the defendant Leibrandt was president of the bank; that on or about July 1, 1915, plaintiff and Leibrandt had a conversation at the bank, at which time plaintiff stated that he had a prospective customer that might be interested in buying some of the bank stock, and inquired of Leibrandt what plaintiff would receive for procuring a purchaser. Leibrandt replied that if plaintiff would procure a purchaser for ten shares of stock for \$1,000, plaintiff would receive

CHARLES E. HARRIS

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one share of stock or \$111 the book value of the same. Plaintiff procured a purchaser who paid \$1,000 for ten shares of stock, and demanded his commissions, which demand was refused.

Defendant contends that the evidence shows that "Leibrandt was not acting for himself, and that there was no agreement that Leibrandt personally was to pay any commission. The bank could only act in the sale of its stock through its duly authorized officers of which Leibrandt, as president, was one. The facts clearly show that if there was any liability it was against the bank and not against Leibrandt."

There is no evidence in the record that would in any way tend to show whether the ten shares of stock sold was the property of the defendant or the property of the bank; neither is there any evidence that would indicate that the defendant was representing the bank. If the defendant would relieve himself from personal liability, the onus was upon him to show that the stock belonged to the bank and that he had authority to bind the bank. This he has failed to do. In the case of Wheeler v. Reed, et al., 36 Ill. 81, the court said p. 91: "If defendant was acting as an agent in making the warranty, the onus is upon him to show he had authority to bind his principal. It is not for the plaintiff to show he had not authority, but the agent must prove it." See also Willoughby v. Brown, 190 Ill. App. 51; Nudelman v. Haffenberg, 199 Ill. App. 463.

The judgment of the Municipal Court of Chicago is correct and it is affirmed.

AFFIRMED.

620 - 22018.

ALBERT PIREK,
Appellee,)
vs.)
FRANK E. SCOTT,
Appellant.)

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

205 I.A. 44

MR. JUSTICE GOODWIN delivered the opinion of the court.

The appellee, who will be referred to as plaintiff, recovered a judgment against appellant, who will be referred to as defendant, for \$600. From this judgment the defendant appealed. The substance of plaintiff's claim, as disclosed by the pleadings and the evidence, was that he had loaned the defendant personally \$1,000, and had received from him five notes for \$200 each, which he supposed were defendant's personal notes, but which turned out to be notes of a company of which defendant was president and plaintiff an employee. The evidence offered on behalf of both parties is to the effect that defendant originally borrowed \$1,000 from the plaintiff, and gave his personal note for it, and that subsequently the note was paid. Plaintiff's testimony, however, tended to show that after the payment of the loan, defendant desired to re-borrow the \$1,000 which plaintiff had put in his safe deposit box, and plaintiff re-loaned it to him and at the same time surrendered the original note and received in its place five notes of \$200 each, which he saw the defendant sign and which he believed to be the personal notes of defendant. The testimony for plaintiff further tended to show that he could neither read nor write the English language, and made the loan as a personal loan to the defendant, and that no suggestion was made to him that he was making a loan to anyone else. The testimony on behalf of the defendant was to the effect that the loan was

made as a loan to the company, and not to defendant. The question of whether it was made to the one or to the other was properly a question of fact for the jury, and upon a careful examination of the record we are unable to say that the jury's conclusion was contrary to the manifest weight of the evidence.

It is claimed that a letter written by one of the defendant's witnesses was improperly received in evidence as it was not written by defendant or his agent, and was not binding upon him. The facts in regard to the letter were brought out on cross-examination, and it was properly admissible as evidence tending to contradict the witness.

For the defendant it is finally contended that the verdict was the result of passion and prejudice induced by the improper conduct of plaintiff's counsel. Counsel did refer to plaintiff as a poor workman; upon objection the word "poor" was withdrawn, and counsel admitted that plaintiff was not poor. Counsel further referred to one of defendant's witnesses as a liar: the court ruled that the remark was highly improper, and upon defendant's motion struck it from the record. No further objection was made to the form or substance of any other part of the argument, and we are of the opinion that the parts to which objections were made and sustained did not constitute reversible error.

The judgment of the County Court is affirmed.

AFFIRMED.

Filed May 2, 1914

488 - 21886

DAVID T. ALEXANDER,

Appellee,

vs.

MUNSON T. CASE,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

2061A.60

MR. JUSTICE TAYLOR delivered the opinion of the court.

The appeal in this case is from a judgment in the sum of \$250.00, in favor of Alexander and against Case, in a suit in assumpsit, for breach of contract in regard to certain fees for legal services.

The declaration, which was filed February 2, 1914, alleged, among other things, that Case, the defendant, an attorney, was engaged by Alexander, the plaintiff, to assist the latter in the rendition of legal services in a certain condemnation case; that it was agreed that whatever fees or compensation was received by the defendant, Case, for said legal services, were to be divided equally between plaintiff and defendant; that on September 22, 1913, Case collected for legal services in said cause, from said Harris and Esther Stern the sum of \$750.00, and that said Case has refused and neglected to pay the said Alexander half of said sum.

The defendant, Case, pleaded non-assumpsit and, specially, that he was employed by the plaintiff, as the agent for Harris and Esther Stern, to render legal services in the condemnation proceedings, and that his, Case's legal

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The spread in this case was \$1,000,000. The sum of \$150,000 in favor of Alexander, and the case, in a suit in rem, for the purpose of the case, in regard to certain cases for legal services.

[illegible]

The defendant, who, located at [redacted],
[redacted] specifically, that he was a [redacted] of [redacted],
agent for [redacted] and [redacted] to [redacted] [redacted]
in the examination of [redacted] and [redacted] [redacted]

services were to be paid for by the Sterns; that he, the defendant Case, rendered certain legal services to the Sterns and upon their failure to pay him therefor he brought suit against them, in which suit the plaintiff, Alexander, filed and entered his written and general appearance as the attorney of record for the Sterns; that he, Case, in the said cause recovered judgment against the Sterns and collected thereon the sum of \$750.00.

The cause was tried before a jury, which brought in a verdict of \$250.00, for Alexander, upon which on June 26, 1915, judgment was entered.

Alexander and Case, both attorneys at law, officed together and undertook to do some legal practice, more or less in common, in the Summer of the year 1912. The general understanding was that where work was turned over by Alexander to Case the fees that might be received therefor would be divided between them. They took part jointly in from six to eight cases, in all of which, with the exception of one known as the Zeman case, the fees were practically equally divided between them. In the latter part of November or the early part of December, 1912, Alexander called Case's attention to a condemnation proceeding which had been pending in court for some time, and which was concerning property belonging to Alexander's father and mother-in-law, Harris and Esther Stern. Case was then engaged by Alexander to go to work in that case. Alexander testified that he told Case that whatever they received for their legal services it was distinctly understood they would divide equally between them. From that time on Case took charge of the condemnation proceedings, and subsequently they were terminated,

DAVID T. ALKEM

Appellee,

vs.

ROBERT T. CASE,

Appellant.

cont.

The appeal in this case was filed in the Court of Appeals for the Second Circuit on January 1, 1934, and was assigned to the Honorable Judge Charles F. Brien. The record in this case is voluminous, and it is not possible to set out in detail the facts and circumstances which led to the filing of this appeal. It is sufficient to say that the appellant, Robert T. Case, is a citizen of the United States, and the appellee, David T. Alkem, is a citizen of the State of New York.

The appellant, Robert T. Case, is a man of about 40 years of age, single, and of average intelligence. He is a native-born American, and has been residing in the City of New York for many years. He is a member of the New York State Bar, and has been practicing law for some time. He is a man of good character, and is well known in the community. The appellee, David T. Alkem, is a man of about 35 years of age, single, and of average intelligence. He is a native-born American, and has been residing in the City of New York for many years. He is a member of the New York State Bar, and has been practicing law for some time. He is a man of good character, and is well known in the community. The facts of the case are as follows: On or about January 1, 1934, the appellant, Robert T. Case, and the appellee, David T. Alkem, entered into a contract for the sale of certain real estate. The contract provided that the appellant was to pay to the appellee the sum of \$10,000.00, and that the appellee was to convey to the appellant the title to the real estate. The contract also provided that the appellant was to pay to the appellee the sum of \$1,000.00 as a commission. The appellant paid to the appellee the sum of \$10,000.00, and the appellee conveyed to the appellant the title to the real estate. However, the appellant did not pay to the appellee the sum of \$1,000.00 as a commission. The appellee brought this action against the appellant to recover the sum of \$1,000.00. The trial court found in favor of the appellee, and the appellant appealed.

The appellant, Robert T. Case, is a man of good character, and is well known in the community. He is a member of the New York State Bar, and has been practicing law for some time. He is a man of good character, and is well known in the community. The appellee, David T. Alkem, is a man of good character, and is well known in the community. He is a member of the New York State Bar, and has been practicing law for some time. He is a man of good character, and is well known in the community. The facts of the case are as follows: On or about January 1, 1934, the appellant, Robert T. Case, and the appellee, David T. Alkem, entered into a contract for the sale of certain real estate. The contract provided that the appellant was to pay to the appellee the sum of \$10,000.00, and that the appellee was to convey to the appellant the title to the real estate. The contract also provided that the appellant was to pay to the appellee the sum of \$1,000.00 as a commission. The appellant paid to the appellee the sum of \$10,000.00, and the appellee conveyed to the appellant the title to the real estate. However, the appellant did not pay to the appellee the sum of \$1,000.00 as a commission. The appellee brought this action against the appellant to recover the sum of \$1,000.00. The trial court found in favor of the appellee, and the appellant appealed.

services were to be paid for by the Sterns; that he, the defendant Case, rendered certain legal services to the Sterns and upon their failure to pay him therefor he brought suit against them, in which suit the plaintiff, Alexander, filed and entered his written and general appearance as the attorney of record for the Sterns; that he, Case, in the said cause recovered judgment against the Sterns and collected thereon the sum of \$750.00.

The cause was tried before a jury, which brought in a verdict of \$250.00, for Alexander, upon which on June 26, 1915, judgment was entered.

Alexander and Case, both attorneys at law, officed together and undertook to do some legal practice, more or less in common, in the Summer of the year 1912. The general understanding was that where work was turned over by Alexander to Case the fees that might be received therefor would be divided between them. They took part jointly in from six to eight cases, in all of which, with the exception of one known as the Zeman case, the fees were practically equally divided between them. In the latter part of November or the early part of December, 1912, Alexander called Case's attention to a condemnation proceeding which had been pending in court for some time, and which was concerning property belonging to Alexander's father and mother-in-law, Harris and Esther Stern. Case was then engaged by Alexander to go to work in that case. Alexander testified that he told Case that whatever they received for their legal services it was distinctly understood they would divide equally between them. From that time on Case took charge of the condemnation proceedings, and subsequently they were terminated,

services were to be paid by the defendant; that he, the defendant, rendered certain legal services to the Sterns and their father in connection with the proceedings against them, in which the plaintiff, Alexander, filed and entered his written and general appearance as the attorney of record for the Sterns; that he, Alexander, said cause recovered judgment against the Sterns and collected thereon the sum of \$750.00.

The cause was tried before a jury, which brought in a verdict of \$250.00 for Alexander, and also on June 26, 1912, judgment was entered.

Alexander and Case, both attorneys at law, practiced together and undertook to do some legal practice, more or less in common, in the summer of the year 1912. The general understanding was that where work was turned over by Alexander to Case the fees that might be received therefor would be divided between them. They took part jointly in from six to eight cases, in all of which, with the exception of one known as the Green case, the fees were practically equally divided between them. In the latter part of November or the early part of December, 1912, Alexander called Case's attention to a condemnation proceeding which had been pending in court for some time, and which he concerning property belonging to Alexander's father and mother-in-law, Martin and Esther Stern. Case was then engaged by Alexander to go to work in that case. Alexander testified that he told Case that whatever they received for their legal services it was distinctly understood they would divide equally between them. From that time on Case took charge of the condemnation proceedings, and subsequently the work terminated,

the Sterns receiving \$18,000 for their interest in the property. There was considerable controversy thereafter between Alexander and Case as to the fees which they should charge for their services. On June 6, 1913, Case having received no fees for services rendered in the condemnation proceedings, brought suit in the Superior Court of Cook County against Esther Stern, Harris Stern and Alexander. Just prior to the institution of the foregoing suit, Case and Alexander had discussed the subject of fees and how the fees might be obtained. Alexander testified as follows:

"Several days after that, when the money wasn't forthcoming, Mr. Case told me - he says, 'I am going to bring suit against your people today.' I said, 'All right, Case. I can't get the money - go to it.' He was still officing with me when he brought the suit; shortly after that he moved. He went upstairs with Mr. Quin O'Brien. I met him several days after that; he wanted to know why it was the folks hadn't had service on them. I said, 'I will tell you, Case, when they are served they are going to bring the summons to me. I know that. They will want me to enter my appearance. I will enter my appearance in the lawsuit for the fees, and then we will have a better chance for settling. But there isn't a question but they will come to me after you have served them.' Probably three or four weeks passed before service was had, and when service was had they brought the paper to me, and I entered my appearance for Harris and Esther Stern."

The foregoing testimony of Alexander is denied by the defendant, Case. It is claimed by the latter that the understanding which was made in March, 1913, was that he, Case, should receive \$50.00 per day for all the time he actually devoted to the condemnation case. Case offered to introduce in evidence an entry in his diary to that effect, to which objection was offered, however, and sustained. After the \$18,000 was paid over to the Sterns, quite a number

of conversations took place between Alexander and Case about the fees. Case claims that about June 4, 1913, having a large payment to make, he offered to settle for \$250.00, if the money was paid at once. Accordingly, Alexander gave him a check for \$250.00, which was subsequently deposited and returned no funds. Case claims that after the suit was brought against the Sterns and Alexander, in which judgment for \$750.00 was subsequently obtained, he did not have any conversation with Alexander to the effect that he would divide with him whatever he would procure by judgment. There is no doubt but that \$750.00 was no more than reasonable compensation for the services rendered in the condemnation proceedings.

After the suit was brought against the Sterns, judgment was obtained for \$750.00 and costs, and that amount was paid to Case. In that suit the only appearance for the defendants, Sterns, was that of Alexander. It will be seen, therefore, that Alexander is now suing Case for part of the fees, for which Case obtained judgment, in a suit in which Alexander represented the Sterns; and in which he undertook to defend them against a claim, one-half of which he claims he owned.

If Alexander was jointly interested in the fees for which Case obtained judgment, and there was an agreement,

of conversation with him, he was not able to say
about the time. He said that he had seen him
having a large quantity of money, and that he
had seen him in a bank for \$100.00, which was
greatly deposited and received no funds. After
the trial was over, he learned that the money
in which judgment for \$100.00 was entirely obtained,
he had no conversation with Alexander as to
effect that he was a very rich man and very
powerful. There is no doubt that the
was no more than a mere speculation, and
rendered in the condemnation proceedings.

After the trial was over, he learned that
judgment was obtained for \$100.00 and that the
was paid to him. In fact, the only question for the
defendants, that is, the trial of Alexander. It will be seen
therefore, that Alexander is now a very rich man, and
for which he has received judgment, in a way in which
Alexander represented the same; and which is entirely
to defend them against a claim, one of the things he should
be owned.

It is also to be noted that in the trial
for which was obtained judgment, and that the

as Alexander claims, to split the fees, then it follows that those fees being merged in the judgment, Alexander is now really claiming a portion of a judgment which he was retained to resist.

The only obligations outstanding at any time to pay fees, were from the Sterns, either to Case or Alexander, or both of them. Alexander will not be allowed to say that when Case sued the Sterns for fees, he, himself, representing the Sterns, recognized that suit as in part for fees for himself.

If Case, in obtaining judgment for \$750.00, recovered more than he was entitled to, it was because Alexander fraudulently and unprofessionally represented the Sterns; and, therefore, to allow Alexander, now, in this suit to recover from Case, would be using the courts and the law to allow Alexander to get judgment by reason of his own fraud.

If both attorneys conspired to obtain a judgment, part of which conspiracy was that Alexander should represent the Sterns, then it is obvious that the law will not help Alexander to obtain the advantage contemplated by the conspiracy. Elkins v. McCaskill, 174 Ill. App. 563; Strong v. Int. Inv. Union, 183 Ill. 101; People v. Gerrold, 265 Ill.

448; Valentine v. Stewart, 15 Calif. 387; Steger v. Hume,
97 Texas, 324; Spinks v. Davis, 32 Miss. 152; Hatch v. Fogerty,
40 Howard Pr. 492.

The moment Alexander became attorney for the defend-
ants in the suit brought by Case for fees, that moment he
must be considered as having abandoned all right to any
recovery against Case for fees for the legal services render-
ed the Sterns.

REVERSED AND JUDGMENT FOR
APPELLANT FOR COSTS.

521 - 21915

WM. T. KELLOGG,

Appellant.

vs.

JOHN A. BICKFORD, Impleaded
with, etc.,

Appellee.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

206 T A 78

MR. JUSTICE TAYLOR delivered the opinion of the court.

Appellant brought suit in the County Court on a promissory note for \$1,000, against the appellee, the maker of the note. The cause was tried before a jury and a verdict rendered for the defendant, upon which the trial court entered judgment against the plaintiff for the costs of the suit.

Appellant complains of certain instructions, and that improper evidence was admitted, and that the judgment is contrary to the law and against the weight of the evidence. Upon the trial of the case the plaintiff offered in evidence the note and rested. The note in question was dated November 23, 1914, and payable four months after date, to the order of Lucius Winchester, and was signed by John A. Bickford, (appellee) and endorsed "Lucius Winchester" and "B. H. Loveless," and was given by appellant to Loveless as agent for Winchester, as part payment for an interest in a certain written contract. At the same time, also, appellant gave Loveless a check for \$666.00, the note and check being appellant's payment in full for his interest in the contract. The agreement

Mr. J. H. H. H.

Applicant

Mr.

John H. H. H.

Applicant

Mr. J. H. H.

the court.

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Applicant ...

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made with Winchester, or his agent Loveless, was that F. A. Hale, J. A. Bickford, (appellee) and B. H. Loveless should pay in cash or notes, an aggregate of \$5,000, and receive therefor what was called a \$5,000 agent's contract, issued by the Domestic Utilities Manufacturing Company of Los Angeles, California.

The evidence of the appellee is to the effect that the agent's contract was never delivered and that there was a failure of consideration. Subsequently, on January 24, 1913, the \$1,000 note in question, signed by appellant, together with another note of \$1,000, signed by F. A. Hale, were put up as collateral security by B. H. Loveless and H. D. Kellogg, (brother of appellant) with the Jefferson Park National Bank, to secure their principal note in the sum of \$925.00, payable to the Jefferson Park National Bank. On March 22, 1913, there was paid to the Jefferson Park National Bank, two checks, one for \$700.00 and one for \$200.00, for which appellant received the \$1,000 note in question, and also the Hale \$1,000 note. There is considerable evidence to the effect that H. D. Kellogg, a brother of the appellant, a few days prior to March 22, 1913, made some inquiries concerning the \$1,000 note in question, and was informed that the note was without consideration and would not be paid when due; and also to the effect that H. D. Kellogg took part in the transaction as an agent for his brother. Appellant admits that he went to the Jefferson Park National Bank, on March 22, 1913, through an appointment with his brother, but claims that the \$900.00 which was paid to the bank on that occasion, for the two \$1,000

made with Lincoln, or with any other person, and that the said
 Hale, J. A. Nichols, (appellant) did not receive any money
 pay in cash or notes, or anything of value, and that the
 therefor was not a gift, but was a loan, and that the same
 by the Comptroller of the Treasury of the United States
 Angeles, California.

The evidence on the up side is to the effect that
 the agent's contract was never delivered and that there was
 a failure of consideration. Wherefore, on January 14,
 1913, the \$1,000 note in question, signed by appellant, was
 given with another note of \$1,000, signed by J. A. Nichols,
 were put up as collateral security by J. A. Nichols and
 H. D. Kellogg, (brother of appellant) with the defendant
 Park National Bank, to secure their principal note in the
 sum of \$2500.00, payable to the defendant and interest
 Bank. On March 22, 1913, the same was paid to the defendant
 Park National Bank, the check, was for \$2500.00, and the
 \$2500.00, for which appellant received the \$1,000 note in
 question, and also the note \$1,000 note. There is consider-
 able evidence to the effect that H. D. Kellogg, a brother
 of the appellant, a few days prior to March 17, 1913, was
 some inquiries concerning the \$1,000 note in question, and
 was informed that the note was without consideration and
 would not be paid when due; and that as the effect was
 H. D. Kellogg took part in the transaction and as appellant
 his brother. Appellant admits that he went to the bank
 non Park National Bank, on March 22, 1913, for the purpose of
 went with his brother, but claims that the \$2500.00 check
 was paid to the bank on that occasion, for the two \$1,000

notes, one of which was the note in question, and the other a note of Hale for \$1,000, was all his own money and paid only for himself.

Evidently the verdict of the jury means that appellant bought and received the note with notice of a failure of consideration. It is not claimed that the plaintiff is not the legal owner and holder of the note in question, nor is there any claim that H. D. Kellogg, (brother of appellant) had any notice of any infirmity in the note prior to January 24, 1913, at the time when the note was put up as collateral security with the Jefferson Park National Bank. The critical question in the case is whether instruction number five, which was refused, and instructions numbers eight and ten, which were given, constitute material error.

In Kellogg v. Hale, 190 Ill. App. 13, a case growing out of the Hale note which was given contemporaneously with the note of appellant, in the same transaction, the late Mr. Justice Baker said:

"There is in the record no evidence of any fraud or circumvention in obtaining defendant to make the note. He knew that he was making a promissory note and only claims that false representations were made to him as to the consideration of the note, and that in fact it was given without consideration. Fraud must relate to the execution of the note and not to the consideration on which it is based. The fraud must consist of some trick or device that induces the giving of one kind of an instrument under the belief of the maker that he is giving one of a different kind. Gray v. Goode, 72 Ill. App. 564. The burden was on the defendants to show that the note was without consideration and that plaintiff was not an innocent holder thereof for value and before maturity."

So in the instant case, there is no evidence in the record of any fraud or circumvention, which caused appellee to execute the note. It is true that in the first plea of appellee, it is charged that the execution of the note was obtained "by use of fraud and circumvention," but the plea then goes on further and states, fully and in detail, a charge of fraud as to the consideration for the note, so that the issue made up by that plea, is, in substance, and obviously, that the note was given without consideration, and not that it was obtained by "fraud and circumvention". Appellant insists, however, that under the circumstances he was entitled to instruction number five, which is as follows:

"The court instructs the jury that there is no evidence in this case of any fraud or circumvention in obtaining the defendant, John A. Bickford, to make or execute the note in question."

Bearing in mind part of the language of the first special plea, that is, the use of the words "fraud and circumvention," it may be that there would have been no impropriety in giving the instruction number five, but considering the actual substance of the first special plea, which was a charge of failure of consideration, and the language of instruction number four, which was given, that the note in evidence "makes out a prima facie case for and on behalf of the plaintiff; that the plaintiff is presumed to be a bona fide holder of said instrument for a valuable consideration and before maturity thereof," we are of the opinion that the refusal of instruction number five was not a material error. We have examined instructions numbers eight and ten, and do not find that they were erroneously given.

It is contended by the appellant that the trial judge erred in admitting testimony of what certain witnesses heard appellant testify to in a trial in the Municipal Court. That evidence was entirely competent. Wheat v. Summers, 13 Ill. App. 448. Evidence of the utterances of a party to a law suit, whether those utterances were in the course of another law suit or not, is competent if material to the issue. As to the contention that the trial judge erred in rejecting appellant's offer of what purported to be a transcript of the testimony of appellant in another case, we are of the opinion that in the form in which it was presented it was obviously incompetent.

There being no material error in the record, the judgment is affirmed.

AFFIRMED.

... ..

1. The first group of people who are not in the labor force are those who are not in the labor force because they are not in the labor force.

$\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$

Journal of Management Education 30(6)p. 709-728

1972 年 1 月 1 日, 1972 年 1 月 1 日, 1972 年 1 月 1 日, 1972 年 1 月 1 日

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Journal of Management Education 30(6)p.789-804

Figure 1. The effect of the concentration of the inhibitor on the rate of polymerization of α -methylstyrene in the presence of SnCl_4 at 25°C .

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

603 - 22001

HERBERT A. PARKYN,

Appellee,

vs.

GEORGE R. TURLEY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2061A 78

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by George R. Turley, (appellant) from a judgment of \$5,395.00, entered in the Superior Court of Cook County, on July 6, 1915, in an action on the case, for the conversion of certain certificates of stock.

Parkyn, (appellee) on February 13, 1908, borrowed \$3,000 from D. M. Bell & Company, who were in the brokerage business, and gave his note therefor in the sum of \$3,000, payable ninety days after date, to the order of D. M. Bell & Company, with interest at the rate of seven per cent per annum. To secure the note, he caused to be deposited as collateral thereto, 2500 shares of certain mining stock. In the note itself it is recited that Parkyn deposited the stock as collateral security and that in case the legal holder should at any time be of the opinion that said stock "is, or may be of less value than above stated, (it being stated in the note that the market value of the stock was then \$7,500), or that the whole or any part of said property has declined or may decline in value, or in case the legal holder hereof shall feel insecure," that the legal holder

may then, in his discretion, call for additional security, and if it is not furnished, may at his option, declare the note due and payable. It was also provided that the legal holder had authority "from time to time to sell, or cause to be sold, all or any part of said pledged property, and any property substituted therefor" on or before the maturity of the note, "if the property or substitutes, or additions, shall depreciate in value, or if said legal holder hereof shall feel insecure, at the discretion of said legal holder," at public or private sale. The transaction was conducted by Parkyn with Turley, at the offices of D. M. Bell & Company, on February 13, 1908.

Shortly after February 13, 1908, the collateral, being 2500 shares of mining stock, and which it was recited in the note of February 13, 1908, was worth \$7,500, was sold. The evidence is conflicting as to exactly what it was sold for, although there is evidence which justifies concluding that it was sold for not less than \$7,000. Turley testified that about the time of the sale the mining stock depreciated to the extent of \$4,500, and that it was sold as a matter of protection. The testimony, however, of Parkyn, Carnahan and Bell, is very convincing that it sold for \$7,000 or over.

On May 13, 1908, at the expiration of the ninety days, Parkyn went to the office of D. M. Bell & Company and asked Turley to be allowed to renew the \$3,000 note. Parkyn testified that he asked Turley if he should renew or pay the note, and that he told him, Turley, that he was ready to do either. Turley testified that Parkyn asked if the loan could be renewed, and that he told him it

[illegible]

that it sold for \$1,000 or over. However, it is not known whether the car was sold to the defendant or to a third party. The car was sold to the defendant in the month of May, 1968, and the defendant was the only person who had access to the car at that time. The car was sold to the defendant in the month of May, 1968, and the defendant was the only person who had access to the car at that time. The car was sold to the defendant in the month of May, 1968, and the defendant was the only person who had access to the car at that time.

[illegible]

could be if he so wished; that Parkyn said he would appreciate it very much if it could be renewed. Accordingly, the old note of February 13, 1908, for \$3,000, was taken up and a new one dated May 13, 1908, for \$3,000, was executed. The latter note was also for ninety days, and recited that the same 2500 shares of mining stock were deposited with the note and pledged as collateral. Also, the recitations with regard to the rights on the part of D. M. Bell & Company, as payee, to sell the mining stock, were the same as in the note of February 13, 1908. At the time this note was given, neither Turley nor D. M. Bell & Company had the mining stock, as it had been sold. Turley testified, when asked why he did not tell Parkyn that the collateral was sold at the time the second note was executed, that "the firm was in a position at any time he, (Parkyn) desired to take up his note to replace that collateral, to go out on the market and buy these securities and deliver them to him upon payment of his note." Parkyn and the witness Carnahan, both testified that in a conversation with Turley, shortly prior to the assignment of D. M. Bell & Company, which took place in July, 1908, Turley admitted that the collateral had been sold because they were hardup. The testimony of Parkyn and Carnahan as to the conversation with Turley, goes to show very strongly that Turley, without right or authority, and in violation of the terms of the pledge, sold the mining stock which had been deposited as collateral to Parkyn's note. Some time in July, 1908, D. M. Bell & Company made an assignment. Prior thereto, in the latter part of May, 1908, Turley left D. M. Bell & Company, of which company he had been vice-president, and became an

employe of the Dudley Tyng Company. The books of D. M. Bell & Company were not produced, the reason given being that after the assignee had finished his work the books were destroyed. Turley had acted as treasurer of D. M. Bell & Company. The witness Bell, who was president of D. M. Bell & Company, testified that three or four days before the assignment was made he told Turley that in justice to Parkyn they ought to make him the assignee. He also testified that Parkyn's credit with D. M. Bell & Company, from the time of the sale of the stock until the time of the assignment, was never less than \$4,000.

The declaration of the appellee, in the first count, avers that defendants "falsely, covinously, wickedly and maliciously, with the intent to cheat and defraud plaintiff, and without any rightful authority, sold, converted and disposed of said goods for the sum of \$10,000, to their own use, or to the use of the D. M. Bell & Company," whereby the property became wholly lost; and in the second count, avers that the defendants, intending to cheat and defraud the plaintiff, and without any rightful authority so to do, converted and disposed of said property to their own use, and misappropriated the property and the sum received therefor; that subsequently D. M. Bell & Company became insolvent, and said property became wholly lost to appellee.

The defendants, George R. Turley and David M. Bell, filed pleas of the general issue, and Turley, appellant, also filed a special plea, setting up that the sale of said property was in accordance with certain authority given in the collateral note.

employee of the United Typing Company. Book of
D. M. Bell & Company were not produced, the
being that after the assignment was made, the books
were destroyed. During the time of assignment of
D. M. Bell & Company. The witness said, and was present
at D. M. Bell & Company, that after the assignment
four days before the assignment was made, the Bell
that in justice to the Bell Company to make the
assignment. He also testified that the Bell Company's credit with
D. M. Bell & Company, from the time of the sale of the
stock until the time of the assignment, was never less
than \$4,000.

The association of the Bell Company, in the first
count, every fact concerning the Bell Company, which
is and maliciously, with the intent to defraud and defame
plaintiff, and without any right and just cause,
converted and disposed of said goods for the sum of
\$10,000, to their own use, or to the use of the
Bell & Company, whereby the property became wholly lost;
and in the second count, every fact and circumstance, in-
tending to show and defame the plaintiff, and which
any rightful authority so to do, converted and disposed
of said property to their own use, and the Bell Company
the property and the sum received therefor; and the
plaintiff D. M. Bell & Company become insolvent, and said
property became wholly lost to the plaintiff.

The defendants, George H. Bailey and David
M. Bell, filed pleas of a general issue, and Bailey,
appellant, also filed a special plea, setting up that
the sale of said property was in accordance with certain
authorities given to the defendant.

The case was tried before a jury. They found for the appellee, and upon their verdict a judgment for \$5,395.00 and costs was entered against appellant, Turley.

It is contended by the appellant that the court erred in permitting the appellee to give in evidence an alleged contemporaneous oral promise by Turley to notify appellee before selling the collateral deposited to secure payment of the note. Appellee, when called as a witness, testified that when he signed the first note he said to Turley, "of course I don't want to be sold out in this note." "If the stock should depreciate in value I want you to notify me. I can take up the note at any time, or I can put up additional collateral, but I simply don't want to be sold out. If you will telephone my office the matter will be taken care of;" that Turley, appellant, laughed and said "that was all right." Over the objection of appellant, the lower court admitted that testimony. In considering the competency of that testimony, it must be borne in mind that the suit was not upon the note, the terms of which, of course, cannot be varied by parol, but was a suit for the conversion of certain certificates of stock. The testimony, therefore, having in mind the issue under the pleadings, was not offered to prove that appellant did not have a right to sell the collateral security, according to the terms of the principal note, but was offered merely as part of the history of the transaction which ultimately culminated in the conversion of appellee's property; and as bearing upon the question of good faith. The conversion proven was not dependent upon a violation of any promise by appellant to appellee that he would notify appellee before sale;

it was the wrongful act of the appellant in misappropriating the plaintiff's property.

It is further contended by the appellant that trover will not lie in this case; that the pleadings and the evidence show that the matter arose ex contractu and not ex delicto. It seems to be the claim of the appellant, Turley, that as an employe of D. M. Bell & Company, finding the security scant and the mining stock speculative, it was decided by the directors that the security should be sold. The evidence shows, however, and justifies the conclusion that Turley, appellant, sold the certificates of stock which were the collateral, not owing to any depreciation in the value of said collateral, and not pursuant to any of the terms of the contract of pledge, as set forth in the principal note, but for the sole purpose of getting the proceeds for the benefit of D. M. Bell & Company. The situation is not similar to that set forth in the case of Loomis, et al v. Stave, 72 Ill. 623. In that case the evidence showed that collateral had been sold according to the terms of the principal note and failed to show a valid agreement for an extension of time; and the court held that trover would not lie. In the instant case, appellant sold the collateral a few days after they were received, and then when the new note was executed recited the same collateral as though they were still on hand; his theory being that if at any time the collateral were needed, for example, in case the principal note were paid, he could go out and buy stock of the same kind and amount. The evidence entirely fails to show that the sale of the collateral was made pursuant to the terms of the principal note, but it does tend to show that the sale was a pre-

meditated misappropriation of the property of appellee. The case of Frederick & Sons v. The C. C. N. Bank, 153 Ill. App. 485, merely holds that a bank which receives property from another corporation, with the consent of all the stockholders, and turns that property into money, in the manner directed by them unanimously, is not liable in trover. Of course, the principle involved there is not applicable here. Turley, appellant, of course, is liable for his own tort; when he sold the collateral as he did, he was personally to blame and responsible for the conversion of that property. That he was an officer of D. M. Bell & Company, to whom the principal note was payable, and in whose possession the collateral was, does not change his liability.

As to the evidence in support of the verdict of the jury, finding that there was a conversion by Turley, appellant, it is not only ample, but in many ways it is overwhelming.

Some objections are made by Turley, appellant, to instructions numbered two, five, twelve and eighteen. The instructions, considered as a series, presented to the jury very fairly and completely the principles of law involved, and we do not find any material error therein.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

mediated the disposition of the property of appellant. The case of Frederick v. Bank of Montreal, 1917, App. 455, merely holds that a bank which receives from another corporation, with the consent of all the shareholders, and turns that property into money, in the absence of fraud, is not liable in trover. Of course, the principle involved there is not applicable here. Turley, appellant, of course, is liable for his own tort; when he sold the collateral as he did, he was personally to blame and responsible for the conversion of that property. That he was an officer of the company, to whom the principal role was assigned, and in whose possession the collateral was, does not change his liability.

As to the evidence in support of the verdict of the jury, thinking that they were convinced by Turley, appellant, is in no way unfair, but in many ways it is overwhelming.

Some objections are raised by Turley, appellant, to questions numbered two, three, twelve and thirteen. The instructions, considered as a whole, presented to the jury fairly and completely the principles of law involved, and he does not find any material error therein. His finding no error in the record, the judgment is affirmed.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 80

Royal L. Hamman, Admr.,

Appellee

vs.

No. 3

October Term, 1916.

Illinois Central Railroad Co.,

Appellant

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

TRIAL JUDGE

HON.

ROBERT H. FLANNIGAN

Term No. 3. In the third of 1911, 17 acres, 7
square miles,
total for 1911

Oscar Wilde

[illegible]

struction out of the country. On a second day, the informant dis-
covered the same man again in the same location, and the
informant advised that the man was a member of the Communist Party.
The informant is not sure of the man's name.

The informant advised that the man was a member of the
Communist Party and that he was a member of the Communist Party
since the 17th day of April, 1944. The informant advised
that the man was a member of the Communist Party and that he was
a member of the Communist Party since the 17th day of April, 1944.
The informant advised that the man was a member of the Communist
Party and that he was a member of the Communist Party since the
17th day of April, 1944.

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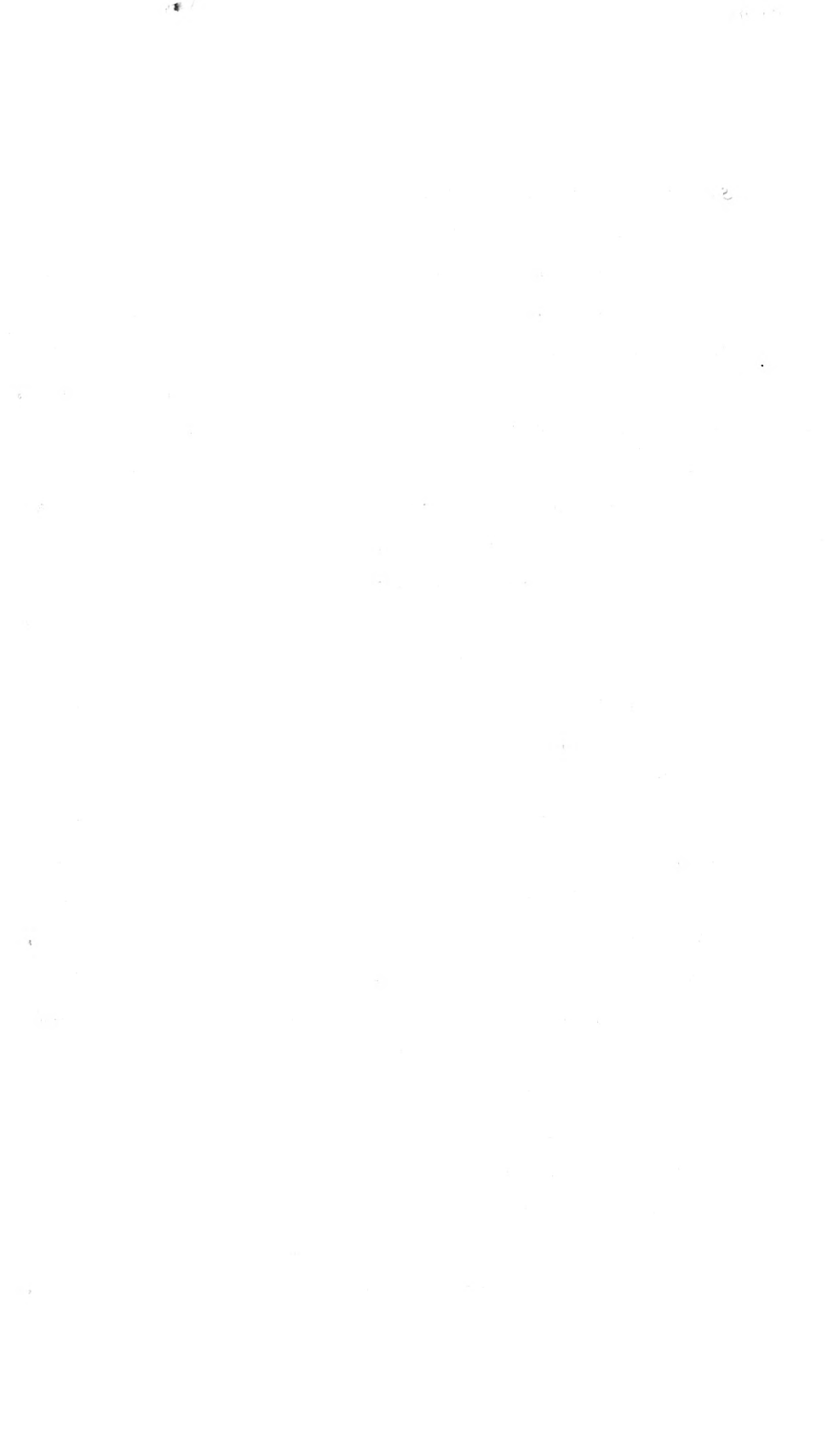
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

20th

day of April,

A. D. 1917.

C. C. Johnson
Clerk of the Appellate Court.

NOINIC

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Matthew Smith, et al,

Defendants in Error

vs.

No. 12

October Term, 1916.

Henry Smith, Exec., et al,

Plaintiffs in Error

2061A 86

ERROR TO
APPEAL FROM

Circuit

COURT

County

COUNTY

TRIAL JUDGE

HON.

W. B. WRIGHT





tified himself, and we have no doubt that he is a man of good character. He told him that Attorney General was to come to town to appoint a conservator. He said he would go to see whether he was crazy or not. He said he would go to see whether he would get anything. The plaintiff introduced his testimony evidently for the purpose of showing that there was an inequality in the life situation of the two parties out of which testimony that Lee told him this or that there was any act done upon the part of any other children to support Lee, or that any other child was made to do so. It is really my counsel that Lee was unfairly treated. It is really my duty to the defendants. There is nothing in this case which we are able to find that warrants us in believing that Lee was the case. Lee in his testimony was certainly more favorable to the plaintiff than the defendants. Defendants could not have called upon Lee to prove any declarations that they had made to him but the plaintiff could have done so but did not do it. It is true it was developed by the testimony that this impression was upon the minds of the jury but it was not wrought about by the defendant, and there is no evidence of it. The plaintiff said that he could prove that such threats and acts had been made and that they were present and could have testified to it if true. It was for the jury to determine whether or not the facts were as stated, under an impression that was true or under the fact that Lee had been inspired or engendered from other sources. It was for the jury to determine whether or not the register was lawfully introduced into the case. If this still was under the same old circumstances, then in this case a matter entirely for the jury. Under the

decisions of this court, to the effect that if a testator, under duress, undue influence or fraud, or for any other reason, makes a will, including the fact that it is, in violation of public policy or immorality, its revocation is not binding, in view of the situation, and the will is not binding of the testator, may be considered as correct, and the will issued thus voided." *Ex parte*, 107 Cal. 2d, 1943.

While it is true that under the law a testator is competent to make a will, and is not unduly influenced, and has the right to dispose of his property as he sees fit, yet under the circumstances in this case the jury is entitled to find that the deceased was unduly influenced and is competent to reason why such finding should be disturbed by this court.

It is complained that the court erred in giving the instruction five. The criticism upon this instruction is that it does not require proof of undue influence. I do not believe that the criticism is well taken. At the very beginning of the trial, the court explained the effect of such influence, and the jury, in its verdict, just preceding it fully explained the effect of such influence, and the proof required.

It is said that instruction five is not binding upon the jury where the false impositions must be proven by the jury must be proven to be false but I never find the jury to assume they were false. It is not believed that this instruction is a mere construction or that even if it is, it would be sufficient to reverse the case.

We are unable to say from this record that the verdict of the jury is manifestly against the weight of the evidence and do not feel warranted in disturbing it, reversing, and the decree of the lower court is affirmed.

Justice Conrad dissenting.

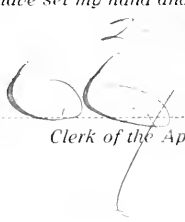
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

day of April.


Clerk of the Appellate Court.

NOINI[®]

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Sue B. Loudon and Lildred Loudon
Executrices,
Plaintiffs in Error

vs.

No. 13.
October Term, 1916.

Terminal Railroad Association
of St. Louis et al,
Defendants in Error

206 LA. 87

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. J. B. WRIGHT



the west side of track 10 as aforesaid. The point at which Loudon alighted from the car and attempted to cross the tracks was about seventy feet north of this point crossing. At that point where Loudon alighted at the time the train stopped on the 10th track, there were several signals or lights well lit to indicate the presence of a train in the vicinity. Several were lighted but there were no signals and no one could with any reasonable distinctness see or detect any light well in that vicinity. There was a cut-over in the track to track 17 in the vicinity of where Loudon alighted from the train and to reach track 10 he had to cross the tracks of two or three railroads. It appears from the evidence that there were other signals besides the one which alighted from the train on the east side. At this time it appears that there was a string of eight freight cars well north of Mr. Loudon upon track 10; five of these were also at the engine and three south of the engine; two engines were loaded south and it about this time Mr. Loudon started across the tracks and about the time he reached track 10 he was struck by the south car of this train of freight cars, knocked down and injured, from which he subsequently died. It appears that this train of freight cars was moving at the rate of from four to six miles per hour, and that one Ernest Vinstanble, who was hired fireman, was standing on the top of the south car with a lighted lantern in his hand. That as Mr. Loudon moved across the several tracks he walked with his head bowed down and apparently did not see the train of freight cars until about the time he was struck by it. Then the train of freight cars was within a few feet



feet of London, several persons in the crowd immediately belabored Mr. London and instantly he fell dead to his knees and about the same time a heavily armed fellow, a German, British and American, and a Frenchman, all of them to his engineer but it was too late, the crowd killed Mr. London and he was fatally injured. Mr. London was an attorney and a business man in West St. Louis, he made daily trips to and from Brenton, Illinois for several years, where he then lived, and during the last year of his life he had lived in Brenton, Illinois, and also made daily trips to and from Brenton, Illinois, and also taking time at this station and was well acquainted with the surrounding conditions that existed there. He enjoyed a lucrative law practice, and as was claimed by the witnesses, had an income of nine or ten thousand dollars per year therefore. He left surviving him a widow and three children.

The first count of the declaration says that the defendant did not carry said Walter London to his destination at Wiley Station in safety and did not give him an opportunity to alight from said train and leave said station in safety. The second count charges that the defendants negligently failed to provide a safe and proper passage for the said London from the said train to the alighting from said car upon the ground at Wiley Station. The third count charges the same with negligence, together with a failure to maintain adequate facilities so that the passengers could cross over the tracks and the safety. The fourth count charges that the defendants

operation and permitted to be over the cross-tie engine and car upon and over other tracks of the railroad company which the said locomotive was required to do, in violation of the plain rule of the city of New York, in that there was not kept down the said locomotive and train at sufficient and corresponding height.

One of the counts of the bill of particulars specified in the other counts and thereafter the bill of particulars.

The sixth count of the declaration charges that the defendants wilfully and recklessly ran and operated said and upon one of its railroad tracks the said locomotive and engine, without warning the said locomotive and engine of the fact, and at a high and dangerous rate of speed, and that the said locomotive and train wilfully and recklessly ran the said Walter Louren down as he was attempting to cross the said track.

It is contended by counsel for defendant in error, hereinafter called plaintiff, that it appears from the evidence in the case that the defendants were negligent, and at the conclusion of their argument to a jury that the declaration charged, after stating that the only negligence was contributory negligence, say that the declaration is in view of the circumstances surrounding the accident at the time of the injury, and relation to the passenger existing between him and the defendants, based on the verdict of the jury which has been based on the theory that he was guilty of contributory negligence wholly unsupported by the testimony.

Let us assume, as contended by the defendant, that the defendants were guilty of the negligence or contributory negligence, however, would not be sufficient to warrant a verdict upon the first four counts of plaintiff's declaration. The plaintiff as to these counts must, in further and prove that the deceased was at the time in the exercise of due care for his own safety, or in other words, was not guilty of contributory negligence, and as to view it, the only question that is necessary to be considered as to these counts is, "was the jury warranted in finding that the deceased was guilty of contributory negligence". The question of contributory negligence was one of fact and if such facts were proven as would warrant the jury in finding the deceased guilty of such negligence then unless such verdict was manifestly against the weight of the evidence this court would have no right to disturb its finding. It appears from the evidence that Mr. London instead of alighting from the train on the platform that had been prepared for exit of passengers, and which he certainly knew of, alighted from the opposite side and undertook to cross the several tracks at the distance of some seventy feet north of where a board crossing had been prepared for passengers to travel upon. He did not take his exit from the train at the place prepared by the company for passengers to alight. While it may be true that it can not be said as a matter of fact that a passenger is guilty of contributory negligence in getting on the train at a place other than that prepared for his exit, if and had been prepared, yet it certainly is a fact to be considered by the jury in determining whether or not he was justified



in leaving the train in that manner, and we think this doctrine is fully sustained in the case of Illinois Central Railroad Co., vs. Harboefer, 76 Am., 674. In Illinois Central Railroad Co. v. Green, 65 Ill., 10, the case was wholly different from the one before us, because the passenger had been invited by the crew, or some of the crew, to leave the train and to go to the platform, and the injury was caused by the negligence of the crew, or some of the crew, in not providing for the safety of the passenger. The line of cases referred to by counsel for the plaintiff seems to be of that character, where the passenger is invited to leave the train or to go to the platform, and the injury is caused by the negligence of the crew, or some of the crew, in not providing for the safety of the passenger. In the case of Illinois Central Railroad Co., vs. Harboefer, 76 Am., 674, the court in discussing that question says, that where the crew are negligent in their directions or omissions, upon whose negligence the passenger has a right to rely, he cannot be charged with contributory negligence in the instance of such other persons, and cites several authorities sustaining this position, among them the case of Illinois Central Railroad Co., vs. Green, 65 Ill., 10, 12, and other cases, and in commenting upon this case the court further says, that it was said in Illinois and Alton Railroad Co., vs. Illinois, 100 Ill., 100, that railroad companies have no right to invite the traveling public to occupy positions on the train, and the cases above referred to, where a passenger is directed to leave the train at a place of danger, or sent to a place where the train is entering a part of the track, and the passenger is injured in so doing, and where it is held that the passenger was not entitled to a right of recovery, and that if such injury against the railroad company, it requires that such movement of the passenger, in leaving the train or in changing his position on the train, was not done



by any direction or invitation of the conductor of the train or other servant of the company. In determining whether or not the deceased was guilty of contributory negligence, the jury had a right to consider the fact that he alighted from the train at a place not provided for passengers, and that he was walking along and leaned over the track at what he must have known was a dangerous place, with his head bowed down and apparently oblivious to things that were transpiring around him, and they were also the right to take into consideration and determine whether or not it was negligence in him to attempt to cross the track without looking to see if a train was approaching, and the jury were the judges of that fact. There were quite a number of persons in the vicinity of where Mr. London was injured that saw this freight car and saw it moving, and saw it moving in the direction of Mr. London and it was for the jury to determine whether or not, in the exercise of due care, he should have seen it. It could then the car moving as it steadily would have stopped and permitted the car to pass by. He was unable to say that the verdict of the jury was manifestly against the weight of the evidence in determining that the deceased was guilty of contributory negligence.

It is insisted by counsel for defendant that the court erred in giving the defendant's first, third, fourth and fifth instructions, in that, and the reason given of the declaration charged that the defendant was negligent and wilful and that by these four instructions the jury were told that the plaintiff could not recover unless it appeared from the evidence that he was in the exercise of ordinary



care for his own safety, and the contention is that under this count of the declaration it was not necessary to prove that the plaintiff was in the exercise of due care for if the defendants were guilty of the willful and wanton acts then liability accrued to the plaintiff, as a result of his negligence. As we understand the law, this position is correct and in the evidence fairly tended to show that the acts were willful or wanton then these instructions should have been left to the jury entirely the consideration of this count of the declaration. It must appear from the record, however, that there was evidence tending to support this count in order that these instructions may be regarded as erroneous. It was said in the case of *Brillion vs. Chicago & North Western Railroad Co.*, 168 A. 2d, 388, "In the *insley* case supra, applied, the plaintiff was a trespasser, and it was held that he could not recover unless the act was wanton and willful. We conclude from these authorities and from *Ill. v. ...*, 120 Ill. 2d, 390; *Chicago Union Traction Co. vs. ...*, 122 Ill. App. 174, that if the acts and omissions here relied upon were proved and were wanton and willful, a plaintiff could recover without proof that he was in the exercise of due care for his own safety". We think that the crucial question in determining whether or not the instructions given were erroneous is, did the proof show or fairly tend to prove that the acts were wanton and willful. The acts charged and complained of as being wanton and willful are that the crew managing said train operating the string of freight



train could not alone be held responsible for holding that the injury was caused by the language there used as grounds for recovery. The more and less on Southern Railway Co., et al., the case of Joyce vs. Erie & Western Ry. Co., 111, 163, and others cited by plaintiffs are not under consideration. The train was running at a high and dangerous rate of speed, irrespective of any signal or bell, without any light, or warning, through a place where persons are liable to cross, and while it is true that it is possible to stop a train here the train was not stopped, and continuing at that rate of speed it could not be stopped in time, and the light was not shown. The witness the broken saw Mr. Loaden approaching the train at some distance before reaching the point where he was injured, and it is said that he was guilty of negligence in allowing the train to proceed. It is said that if Mr. Loaden would see the train moving and would not be so imprudently present and not have been on the railroad in front of the moving train. Little v. Erie & Western Ry. Co., 111, 163. It is evident from this testimony that defendant Stanley did not realize that there was a train to what was going on around him until they were within a very few feet of him, and could not have been expected to do so. The engineer and others could not be expected to do so at the time the engineer started the train, and the broken saw the light and the broken saw, these acts may have been negligent (Little v. Erie & Western Ry. Co., 111, 163).



expressed in this opinion) we think they are very far from being wanton and willful, and there being no evidence to support this theory of plaintiff's case the giving of the instruction was not erroneous.

The first instruction given on behalf of defendant is also complained of because it is alleged that the part of the charge which looked to the duty of the defendant to look out for the plaintiff was not properly stated. It is contended that the instruction should have been worded to require the defendant to look out for the plaintiff to the extent of his duty, and that the instruction as given was not correct. We do not believe this instruction is subject to criticism because it, provided that in ordinary care required him to look out that he was guilty of negligence in not looking out, and that if the exercise of ordinary care had ascertained the approach of said train and avoided the injury, it was his duty to do so. We see nothing wrong with this instruction and how or to whom it should have been referred.

We think that the criticism upon instruction No. 1 is without merit. The jury has the right to act upon the evidence as the court permitted it to be received by them, and if they had been directed to pick out the material part and not upon that this would have been erroneous, unless the material parts had been explained. The objection is not well taken.

While we are of the opinion that the accident, injury and loss to this family is to be very much deplored, yet we are unable to say from this evidence that the jury erred in finding that the deceased was not in the exercise of due care for his own safety or that the acts were wanton and willful upon the part of the defendant, or that judgment of the lower court is affirmed.

THE COURT'S DECISION.

Not to be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this .
A. D. 1917.

20th

day of April.

Clerk of the Appellate Court.

NOINIC

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A.D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Launie Banking Company,
Appellant

vs.

No. 18
October Term, 1916.

John Eplin,
Appellee

206 I.A. 90

ERROR TO
APPEAL FROM

Circuit COURT

White COUNTY

TRIAL JUDGE

HON. JULIUS C. KERN

Term No. 18. In the Appeal to Court, Appellate No. 41,
Fourth District.
October 20, 1911.

Laurel Banking Company,)
Appellant.)
vs.) Appellate No. 41, Fourth District Court
of White County.
John C. Lee,)
Appellee.)

Carriage, A. J.

It appears from the files in this case that the
appellee failed to file a brief herein as required by the
rules of this court, and for that reason the judgment of the
lower court will be reversed and remanded. This court provides,
"Brieves for appellee or defendant in error must be filed
within ten days after the time fixed for filing brieves for
appellant or plaintiff in error, or within such further time
as may be granted by the court on motion; and if not so filed
the judgment or decree of the court below will be reversed
and remanded, etc." The appellee neither filed a brief nor
asked an extension of time herein. It is therefore ordered
that the judgment of the lower court is reversed and remanded,
and the cause remanded.

Not to be reported in full.

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ...
A. D. 1917.

20th

day of April,

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

O. W. Richardson & Co.,

Appellant

vs.

No. 21

October Term, 1916.

Edward Steinfort et al,

Appellees

206 I.A. 91

ERROR TO
APPEAL FROM

Circuit COURT

Jasper COUNTY

TRIAL JUDGE

HON.



Term No. 21. In the Appellate Court, Fourth District.
October Term, 1914.

C. J. Richardson & Company, }
Appellant, }
vs. } Appeal from Jasper County
Edward Steinfort and Richard } Circuit Court.
Steinfort, }
Appellees. }

McBride, J.

The Circuit Court rendered judgment against the appellant for costs, to reverse which the appellant brings this appeal.

It appears from the record in this case that at some time prior to September 3, 1914, the appellant ordered of appellee four rugs, one of which was an administer rug valued at \$16.50. The appellant claims to have shipped these rugs on September 3, 1914 to appellees of Jasper County, Illinois. The appellees admit that they received three rugs but deny that they received the administer rug. On September 11th the appellees advised appellant that they had not received the rug in question and requested appellant to return it and forward it at once. After considerable correspondence with reference to this rug the appellant, on October 1, 1914, again advised appellee that the rug ordered on September 3 had not arrived and that if they could not return



it to ship another at once and on Oct. 11, 1914, before any of the wire pattern was shipped to the appellant, check was received by them, and on December 1, 1914, appellant sent appellant a check for \$100. It must be noted that the evidence that the freight bill for the shipment of December 3rd, 1914, was marked "short" but the evidence in the record to show when or by whom it was so marked. It is insisted by counsel for appellant that in view of the rug in question was delivered by the appellant to the railroad company and assigned to the railroad company and that it was in effect a delivery by appellant to the railroad and entitled appellant to recover for the value of the rug. This proposition of law is a correct one, as we understand the law, unless there was a contract or agreement to deliver the rug at Willow Hill. The appellee E. J. Trainor in his testimony says that the rug was to be delivered at Willow Hill and it is in fact decided, even on the order, a party was made, for the shipment of the rug as introduced in evidence and we think that the court was warranted in deciding that the rug was to be delivered at Willow Hill, and that the principle of law invoked by the appellee is not applicable to the facts in this case. It further appears from the record that there is no evidence to show anything that appellants delivered the rug to the railroad company. It was sought to have this fact proved by introduction of the bill of lading, that was issued at the time of the shipment of December 3, 1914. The bill of lading was showing the original bill of lading and appellant offered a copy of it which was objected to and the objection sustained by





I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this..

25TH

day of April.

A. D. 1917.


Clerk of the Appellate Court.

NOINIC

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 99

Laura Snodgrass, Admrx.,

Appellee

ERROR TO
APPEAL FROM

vs.

No. 26

City

COURT

October Term, 1916.

Wilson and Dotter, Receivers,

Alton, Ill.

COUNTY

C. P. & ST. L. R. R. Co.,

Appellants

TRIAL JUDGE

HON.

J. F. DUNNIGAN

Term No. 26. In the Appellate Court, Second c. &
Fourth District.
October 10th, 1910.

| | | | |
|---|---|--------------------------|--|
| Laura Shodgrass, Wif. of the | } | | |
| Estate of John L. Shodgrass, Deceased. | | | |
| vs. | | Appellants from the City | |
| Alfred Dixon and Wilbur C. Coker, | } | of Alton, | |
| Receivers, Chicago, Leoria | | Illinois. | |
| St. Louis Railroad Company, | | | |
| Appellants. | | | |

Decided by J.

The plaintiff recovered a judgment and the de-
fendant for costs. and as to to reverse the judgment
this appeal is prosecuted.

It appears from the record in this case that on
August 3, 1911, at about 3:30 o'clock in the afternoon,
John L. Shodgrass, husband of the appellee, was struck and
injured by a passenger train of the Atlantic in the city of
Alton, from which injuries he shortly thereafter died. The
deceased was of the age of fifty-eight years and a teacher
by occupation.

It appears from the evidence in this case that the
railroad tracks of appellant and that of the Illinois Central
Railroad ran parallel to each other, and west
through the eastern part of the city of Alton, crossing
Alton Street and other streets of the city extending north
and south. The deceased on the evening in question was

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going from some point west of Plum Street to care for some hogs that he or his son had charge of, south or east of Plum Street. The first that was seen of him was going east between line and monument tracks branching between the tracks of the appellant and the Illinois Terminal railroad, and upon reaching Plum Street he turned to the south to cross appellant's track and had so far crossed the track that he was either standing on the tie or was one foot over the south rail of the track and was in this position when he was struck and injured by appellant's train. There were no objects of any kind to shut off the view or prevented from seeing an approaching train, and the track was straight with an unobstructed view to the west for the distance of four to six hundred feet. When the deceased reached the point at where he was standing on the end of the tie with one foot across the south rail he stopped and stood there for some little time without any apparent reason therefor. Some of the witnesses say there was a boy and woman close by and the deceased was apparently engaged in a conversation with this woman.

It further appears that as he endeavored to cross the track his head was drooped and he did not look either way to see if there was an approaching train, and his evidence shows that the boy was closer and he looked to the west he could have seen the train approaching him from that direction. The testimony further discloses that immediately before striking the deceased the engine of the train gave four shrill blasts of the whistle but it appears that the engine was very close to him when these blasts were given. The

evidence with reference to the ringing of the bell is conflicting. Some of the witnesses state that it was not ringing and others that it was. The train was running at the rate of from thirty to thirty-five miles per hour.

The defendant urges two grounds of reversal in this case two reasons. One is the giving of an erroneous instruction on behalf of appellant and the other is that the deceased was not in the exercise of due care for his own safety at the time he was injured. In this case it is held in this case it will not be necessary to consider the question as to the erroneous instruction because of the opinion that the case will have to be reversed because it does not appear from the evidence that the deceased was at the time of his injury in the exercise of due care for his own safety. It appears from the evidence that the day was clear and the deceased had an unobstructed view of the railroad track for the distance of from four hundred to five hundred feet west from the point where he was injured, that there were no other trains passing along the other railroad tracks or unusual noises of any kind, or nothing that he could see would in any manner tend to confuse the deceased and cause him to fail to look or listen for an approaching train as he attempted to cross the track, and he certainly did not look or listen for if he had he could have seen the train and avoided the injury. When he reached the south end of the track he stopped and was standing there stopped over and over stopping, did not move until he was struck by the train and the ordinary steps would have carried him beyond the reach of the train. There is nothing in the evidence showing



any reason why he should not have seen and heard this train approaching.

It is contended by counsel for the plaintiff that it cannot be said as a matter of law that the deceased was negligent where all signs could be perceived from or the facts without hesitation or doubt, and that as a matter of law the deceased was bound to look and listen before crossing the crossing. It is argued that the duty to look to see if a train is approaching is not in law negligence per se but it may be negligence in fact if there are no conditions or circumstances which excuse looking or listening. In this case our attention has not been called to a single circumstance that would be added to excuse the deceased from looking and listening before he attempted to cross the track, and it is said in the case of *W. & A. R. Co. v. Wilson*, 11 App., 144, after reviewing some of the authorities upon this question that, "these authorities, and many others that might be cited, warrant the statement that while a failure to look if a train is approaching is not in law negligence per se, it is negligence in fact, if there are no conditions or circumstances which excuse looking. And a jury, without evidence of conditions or circumstances which excuse looking, when looking would be shown to be negligent, is not warranted in finding that such failure to look is not negligence." One who is driving a railroad car is bound to look that it is a place of danger, and to give his attention to the sights and sounds warning of an approaching train that a man of ordinary caution, under like circumstances, would give. If he shall permit himself to become absorbed



in thought about other matters, and in consequence of, oblivious of his present surroundings, he said to me, "this world." Q. . . .

While a court on the other hand, is not in di-
stressing verbiage, nor is it concerned with the
person injured, yet when it appears from the facts
there are no circumstances or conditions which would
excuse the locking, or if locking and not locked
or fastened the injury could have been avoided, the fact con-
strains to hold that a failure to lock or to fasten under such
conditions shows a want of due care and a liability on the part of
all persons who would concern in saying that under the condi-
tions here shown that the deceased was not using due care for
his own safety.

We are of the opinion that the agent was not in the exercise of due care; that his negligence was directly caused in other matters and was a violation of the conditions surrounding him and the dangerous position in which he placed himself but this would not excuse him for exercising due care, and so he did not so so we are of the opinion that the judgment should be reversed without remittage.

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not to be reported in full.

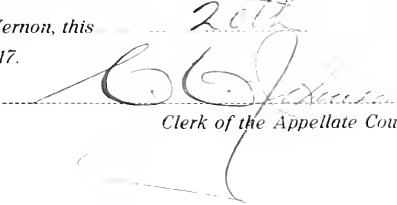
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to find, as a statement of fact in the case, that the deceased took the necessary steps to ensure that his brain was not in the emergency of an epileptic seizure.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 20th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINIC

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice:

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Katie Hatzembuehler, Admrx.,

Appellee

vs.

Circuit COURT

Circuit

COURT

No. 36

October Term, 1916.

Illinois Central Railroad Co.,

Appellant

St. Clair COUNTY

COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW



Term No. 36. In the Appellate Court, Appellate No. 37
Fourth District.
October Term, 1911.

Lottie Latzenbuchler,)
Administratrix of the estate of)
Thomas Latzenbuchler, deceased,)
Appellee.)
vs.) Circuit
Illinois Central Railroad Company,) Court of Cook County
Appellant.)

Decided, 1911.

The appellee recovered a judgment in favor of her claim in the Circuit Court of Cook County, and the grand jury returned a verdict in favor of the appellee, to reverse which this appeal is presented.

The injury complained of occurred at the intersection of Jackson and 14th streets in the City of Belleville, Illinois, on the 1st day of March 1914, at 10 o'clock and 1:30 at night. Jackson street crosses Church street parallel to and west of that is High street, and west of that is Illinois street. Church street is on the east of Jackson street. 14th, 15th and 16th streets extend north and south; 14th being the most northerly of said streets. The Illinois Central Railroad passes through this part of Belleville in a north westerly and south easterly direction, crosses Illinois street at or near its intersection, with a line extended west from the termination of said street. The railroad crosses in a southeasterly direction and crosses High street near the intersection of this street with 14th street, and crosses Jackson and 15th streets at the intersection of these two streets, and then extend in a southeasterly direction to



Church street. The name of the deceased was John E. Schenck; he was the husband of Mrs. Schenck, who lived on Church street near its intersection with Jackson street. The deceased had been working the evening of the day at the saloon which was located in the south east corner of the block of ground that lies north of Tenth street and east of Jackson street. The south side of the building was at or about the north line of Tenth street, and the east line of the building was located at or about the west line of Jackson street. There were two entrances for access to this building, one at or near the south east corner thereof, and the other at or near the northeast corner; one of which was used as an entrance from Tenth street and the other from Jackson street. On the evening in question the deceased had left the saloon to go to his home and after reaching it to the south side thereof he met Victor Christmann who came from the north on Jackson street, and he and the deceased stood there and talked for about ten minutes, or fifteen, maybe, and then separated and Christmann went in to the saloon, entering the same at the north east corner thereof and the deceased started on his way home, which was to the north east. This was the last that was seen of the deceased before he was injured. It appears that the distance from the point where Christmann last observed the deceased to the place where the railroad tracks pass off of Tenth street was about seventy-five feet and that it was in the neighborhood of twenty-five feet to the northeast entrance of the saloon. Christmann was passing along the railroad within a short distance of the deceased had left Christmann and discovered the body of the





It is contended by counsel for the plaintiff that the evidence does not show the appellant to have been negligent. That it is asserted that the injury was done on the crossing of the highway, that the deceased was not in the exercise of due care for his own safety, and that the court erred in refusing certain instructions offered by appellant. Upon the question of the negligence of appellant and the place where the deceased was injured the testimony was quite conflicting, but the evidence of negligence if taken alone was sufficient to show that the appellant was moving its train at a greater rate of speed than that permitted by law or ordinance, and that it was not ringing the bell upon the engine as required by the ordinances to be used. While it is true that the body was found off of the crossing at Jackson street and about midway between Jackson and Church streets, yet there was evidence tending to show that the hat and spectacles were discovered to be near Jackson street; that there were pieces of flesh found along the railroad even as far as the street and that pieces of flesh that was identified as being a portion of the flesh of the deceased was found fastened to a portion of the railroad track on the crossing of the highway. The witnesses also testified that a piece of flesh of the deceased was found at about the highway; so that the evidence introduced by appellant was sufficient to warrant the jury in finding that the deceased was struck by the train upon the public street. It is well settled by the decisions of this and other courts that although the evidence may be conflicting, if the evidence of the plaintiff is sufficient to warrant the jury in finding



that the defendant was negligent or that the injury occurred at the crossing of the street, and which was manifestly against the right of the plaintiff, the jury should not be disturbed the verdict of the court.

The next question presented for the consideration was not in the extreme of the former proposition. This was a question of vital importance in the case and before the appellate court over it was not only to show that the deceased was in the exercise of due care for his own safety. *Volstead, 81 F. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.*





[illegible]

presumption created by the habits of the deceased, and the force of the opinion that the verdict of the jury, upon their presentation, which was a material one and necessarily to be proved by plaintiff, was manifestly against the weight of the evidence, and that the verdict of the jury is wrong and should be set aside.

The judgment of the lower court is affirmed and the cause remanded.

WILLIAM J. BROWN, JR.

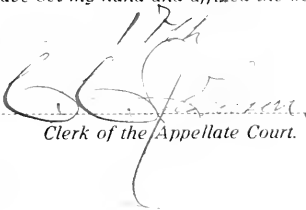
Let the case be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ...
A. D. 1917.

17th

Clerk of the Appellate Court.

day of April.

NOINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

W.A. Miller and Louise E. Miller,

Appellants

vs.

No. 42

October Term, 1916.

George C. Lindemann, Guardian,

Appellee

206 I.A. 130

ERROR TO
APPEAL FROM

Circuit

COURT

St. Clair

COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW



Term No. 43. In the Circuit Court of the
County of St. Clair,
October 20, 1915.

In the matter of J. A. Miller and
Louise J. Miller,
Defendants.

vs.

George C. Lindemann, Guardian of the
estate of Ida C. Lindemann, (deceased),
Lindemann and Lloyd C. Lindemann, (deceased),
Appellants.

Filed for
the Circuit Court of
St. Clair County,
Illinois.

to wit, J. A.

On August 2, 1915, the Circuit Court of St. Clair County a petition filed in which the
plaintiff, Louise J. Miller was the widow of George C. Lindemann,
and mother of Ida, Helen and Lloyd C. Lindemann. George C. Lindemann
died October 2, 1913, in St. Clair County, Illinois,
and left surviving him, Louise his wife, and three
children. That he left an estate to the income of which
amounting fourteen thousand dollars. That on or about
George C. Lindemann was appointed guardian of the estate of
on June 2, 1915 the petitioners J. A. Miller and
Lindemann were married. The petitioners J. A. Miller and
prior to the marriage the petitioners J. A. Miller and
selves that J. A. Miller could not be considered as
parent to the three children and should not be entitled
for the board, etc., but that the three children should be
of the income of their respective estates and should be

remain in the custody of their mother. After the marriage, petitioners testified that their children desired to be paid out of the income of said income for their board, clothing, etc., and that they were paid for June 1, 1913 to June 1, 1914, for Ida \$11.6, for Helen \$30.6 and for Lloyd \$11.3, and that these expenditures were fair and reasonable. That since June 1, 1914 to the filing of this petition they have had the custody and control of said minors and supplied them with board, clothing, etc., according to their station in life and that said expenses reasonably worth two dollars per week each or \$24.00 of \$28.30 to July 1st, 1915, and arrears on or at that time the guardian to pay petitioners the sum of \$71.5 out of the income of said minors, to July 1, 1915, and that said guardian be further directed to pay out of the respective incomes of said children for the year ending July 1st, 1915, two dollars per week each, payable monthly, quarterly or as the court may see proper. This petition was heard by the Probate Court and the prayer thereof denied, from which an appeal was prosecuted to the Circuit Court of St. Louis County where it was again heard and refused by the Circuit Court to reverse which order the appellants prosecute this appeal.

It appears from this record that said wife died in October, 1911, and left by will, to her husband (nee Lindemann) his widow, and three children, Ida, Helen and Lloyd. Lloyd was of the age of one year, Helen four or five years. Gustavus Miller has had the children since his death. It also appears that he left an estate to these minor children of about thirty thousand

dollars which the guardian had earned and paid for the maintenance of the children, an income therefrom of about six percent per annum. It further appears from the evidence that when the guardian married the child here they commenced her in the house and took the three minor children into their home for them. They lived a while in Chester, Maine and then from there to Fryatt, Arkansas, and then moved on to St. Louis and have since lived there and in the vicinity thereof. It further appears that after they lived at Fryatt, Arkansas, the appellant and J. Miller visited together to the guardian, in which he stated, "I am going to have for my own month's wages, I think, the money they have, I paid for the children and to get along, I started to take the allowance until I can get this money paid my way, I think, we do not want any trouble or expense with that money, the allowance as she is allowed by law. It does not matter to me she is at or no she is married to..... I think that to law she will claim all she has and you will have to pay the money referred to that he desired. I thought that it could be paid was as we would infer from the evidence that they had some in some bank. From the evidence introduced, consisting of witnesses, I think more that knew Mr. and Mrs. Miller from 1890 to 1895, 15, and others since that time, who said they were at the house and saw how the children were cared for, and how reasonably worth from two to four dollars per month for each child, but these witnesses had no money, no money, and who furnished the clothing or provisions in the house for the children but seemed to agree that it was done by the guardian."

Louise Miller and W. A. Miller were also offered as witnesses but their testimony was objected to but was heard by the court subject to the objection. The appellee is designating as guardian in this matter and we are of the opinion that they were not competent witnesses.

It is insisted by appellant that the petitioners prior to their marriage had an understanding and agreement that the petitioner W. A. Miller would not assume the relation of father to these children but they could be supported out of the income of their part of their father's estate. We have read the abstract carefully and find no testimony in this record to support that statement. On the trial of the case the appellee was placed upon the witness stand by appellants and he stated positively that no arrangements of any kind had ever been made with him about contributing to the support of these children or that he had ever had any arrangement with Mr. Miller. The itemized account of appellants claim is shown in the record to consist of provisions for the respective children, shoes, medical attendance, dresses and underwear and other apparently reasonable expenses but there is no testimony in the record showing who furnished these or under what conditions they were furnished or the date for them or anything about it, just the mere claim presented as an exhibit.

The question arises in this case as to whether or not the appellants can recover from the guardian for money expended by them in the support of these children without first having obtained from the court an order to do so. Under the law the guardian is permitted to expend from the income



of his ward's property such amount as may be necessary and proper for the suitable support of the ward but this must be determined, as we take it, by the guardian or by the court having charge of the fund. It appears from the petition and circumstances in this case that the minors have an income of about seven hundred dollars a year, and the property shown to be owned and possessed by the father is not very great, and it would look as if such part of the income as was necessary for the support of these children should be used in that way, and if proper application was made to the court doubtless an order could be secured directing the guardian to contribute to the support of the children, if such guardian was unwilling to do so without an order. It appears, however, that the appellant Miller upon marriage to Louise became the head of the family and took these children into his family and cared for them and as we understand the law so long as he did so he could not recover from the guardian for their support and maintenance but if he desires to sever his relation with these children as parent he certainly has the right to do so, and in so doing he should notify the guardian of his refusal to longer keep the children without compensation and then if the guardian neglected to provide a place for them or make a contract in regard to compensation he would be entitled to recover reasonable wages for his keeping after such notice. In the case of Meyer vs. Estate, (guardian, etc., 72 Ill., 577, the court says, "If on the other hand, in the first instance, he severed the relation of father to the children, without any contract or understanding



ing that he should be paid, and he could recover only while they were thus kept, yet, their support, maintenance or liability resting upon appellant for their support, and then he was proper, if at any time he was in contact with the guardian in regard to the keeping, that was sufficient evidence to go to the jury, to show that appellant's relation as father towards them had ceased. And, if it appears, appellant refused longer to keep the children without compensation, and so notified their guardian, and the guardian neglected or refused to provide a place for them, or made no contract with appellant in regard to compensation, appellant would be entitled to recover reasonable pay for the keeping after such notice, after deducting the value of their services".

It appears to us from this record that the appellant, Miller, in the first instance assumed the position of parent to these children and it is not charged that any notice was given of his refusal to longer keep the children without compensation. It is true a letter was written by Miller to the mother of the wife and children while they lived in Arkansas, to appellee, but this letter was merely a request to assist them for the time being, and not a notice of withdrawal from the children longer without compensation. The evidence offered by appellants in this case was very meagre and we do not believe that the court could have been justified in following the appellants' claims. While it is true that it is inequitable to require the appellant father, who is apparently not receiving any benefit from the labor of these children, to support them and maintain them yet the courts have no

1. The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is the question of the origin of the first living organisms. The philosophical aspect is the question of the origin of the universe.

2. The second part of the paper is devoted to a discussion of the scientific aspect of the problem. It is shown that the scientific aspect of the problem is the question of the origin of the first living organisms.

3. The third part of the paper is devoted to a discussion of the philosophical aspect of the problem. It is shown that the philosophical aspect of the problem is the question of the origin of the universe.

4. The fourth part of the paper is devoted to a discussion of the scientific aspect of the problem. It is shown that the scientific aspect of the problem is the question of the origin of the first living organisms.

5. The fifth part of the paper is devoted to a discussion of the philosophical aspect of the problem. It is shown that the philosophical aspect of the problem is the question of the origin of the universe.

6. The sixth part of the paper is devoted to a discussion of the scientific aspect of the problem. It is shown that the scientific aspect of the problem is the question of the origin of the first living organisms.

7. The seventh part of the paper is devoted to a discussion of the philosophical aspect of the problem. It is shown that the philosophical aspect of the problem is the question of the origin of the universe.

power to allow him for such expenditures out of the company's fund, except it be in accordance with the law and the approval of those who have control of the fund.

We are of the opinion that the court did not err in refusing to allow this claim, and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

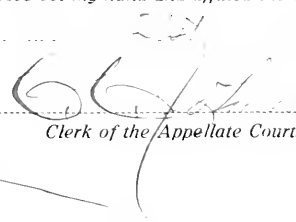
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

22 day of April,

A. D. 1917.


Clerk of the Appellate Court.

NOINIC

Relig denied

3187

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

| | |
|---------------------|--------------|
| 206 I.A. 139 | |
| Charles W. Young, | |
| Appellee | |
| vs. | |
| No. 48 | |
| October Term, 1916. | |
| Abner C. Barr, | |
| Appellant | |
| | CITY COURT |
| | ALTON COUNTY |

TRIAL JUDGE

HON.

J. E. DUNNIGAN

"Term No. 48. In the Associate Court of the District of Columbia, 1916
Court District.

October 1916.

Charles J. Barr,
Appellee.
vs.
Amos C. Barr,
Appellant.

Appeal from the City Court of Boston.

J. C. ride, . T.

"It is an action of replevin, if it is so characterized, to recover from appellant for services rendered by appellee in effecting sales of certain land owned by appellee at in-
the fact, a trial was had by a jury, and a verdict rendered in favor of appellee for \$500.00, upon which verdict the court rendered judgment for said appellee, and he sought to reverse the judgment.

It appears from the record in this case that the defendant was the owner of a large body of land in the State of Florida, which he had built up in his own right, and which he was now in the process of selling to the public. The defendant had considered real estate as a business, and he had prior to that time been engaged in the business of selling Florida lands and was well known in the State as a land dealer. He was the sole of the State of Florida, and he was the only one selling the lands of the State. It is claimed by the defendant that he was the only one selling the lands of the State, and that he was the only one selling the lands of the State.

Gerson with reference to these lands and that he secured
-en graves, a neighbor of his, to assist him in effecting a
sale to Gerson, which he did, and that he paid an agree-
ment for this service; that he explained to appellant his connection
with Gerson and the arrangement that he had effected with
-en graves and that appellant upon the order of an office paid
-en graves for the services rendered, and charged them to
appellant's account. It is true that Gerson denies that ap-
pellee caused or influenced him to purchase these lands but
admits that he had a talk with him about some lands in Flori-
da but did not remember and did not know whether it was the
lands of appellant or not. The appellant claims that these
commissions were paid to -en graves for being interested
other purchasers, being the owners, in the buying of other
of these tracts of lands but -en graves and appellee both
testify that it was for services rendered in effecting the
sale to Gerson. There is also a conflict in the evidence
with reference to the sale to Shultz. The an office testifies
that he had a conversation with Shultz in 1910 with refer-
ence to the lands of appellant and that Shultz promised him
that he would go and look at the lands and that after that he
assisted Shultz in securing a ticket to go to the lands,
and while Shultz denies that appellee was the person who
for his purchase of the lands and says that he did not think
he promised appellee that he would go and look at the lands,
but was not sure about this but conceded that he talked to ap-
pellee over the telephone with reference to the purchase
of a twenty-five day ticket for a trip to Florida, at which
time he visited these lands.



While there were some slight differences in the evidence
presented upon the trial of this case, the evidence was sufficient to
support the verdict in his testimony and the jury's verdict was
not affected or the purchase was not affected by the efforts of
appellant, yet they were not sufficient to support the
verdict of appellant's testimony and the jury's verdict was not
affected, so that when all is considered it resolves itself in the
favor of the verdict of the jury.

If the jury believed the evidence presented, they were
justified in finding a verdict for the defendant, and if they
had believed the evidence presented by the witnesses, they would
have been justified in finding a verdict for the plaintiff.
It is well settled in this state that unless the evidence is
manifestly against the weight of the evidence, a court of ap-
peals has no right or power to disturb the verdict, and we
are unable to say in this case that the verdict is manifestly
against the weight of the evidence, and the judgment of the
lower court is affirmed.

John H. ...

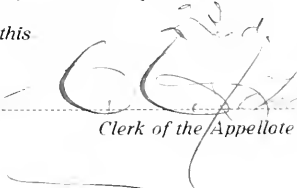
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

day of April,


Clerk of the Appellate Court.

NOINIC

87

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 155

City of Alton,

Appellant

ERROR TO
APPEAL FROM

vs.

Circuit

COURT

No. 65.

October Term, 1916.

Ladison

COUNTY

George Liller,

Appellee

TRIAL JUDGE

HON.

GEORGE A. CROW



Term o. 65.

Appeal to Court

1907, 17

Fourth District.

October Term, A. D. 1910.

John H. Alto,)
Appellant.)

vs.)

George Miller,)
Appellee.)

Special Agent in Charge,
of Madison, Wis.

C. Rice, J. C.

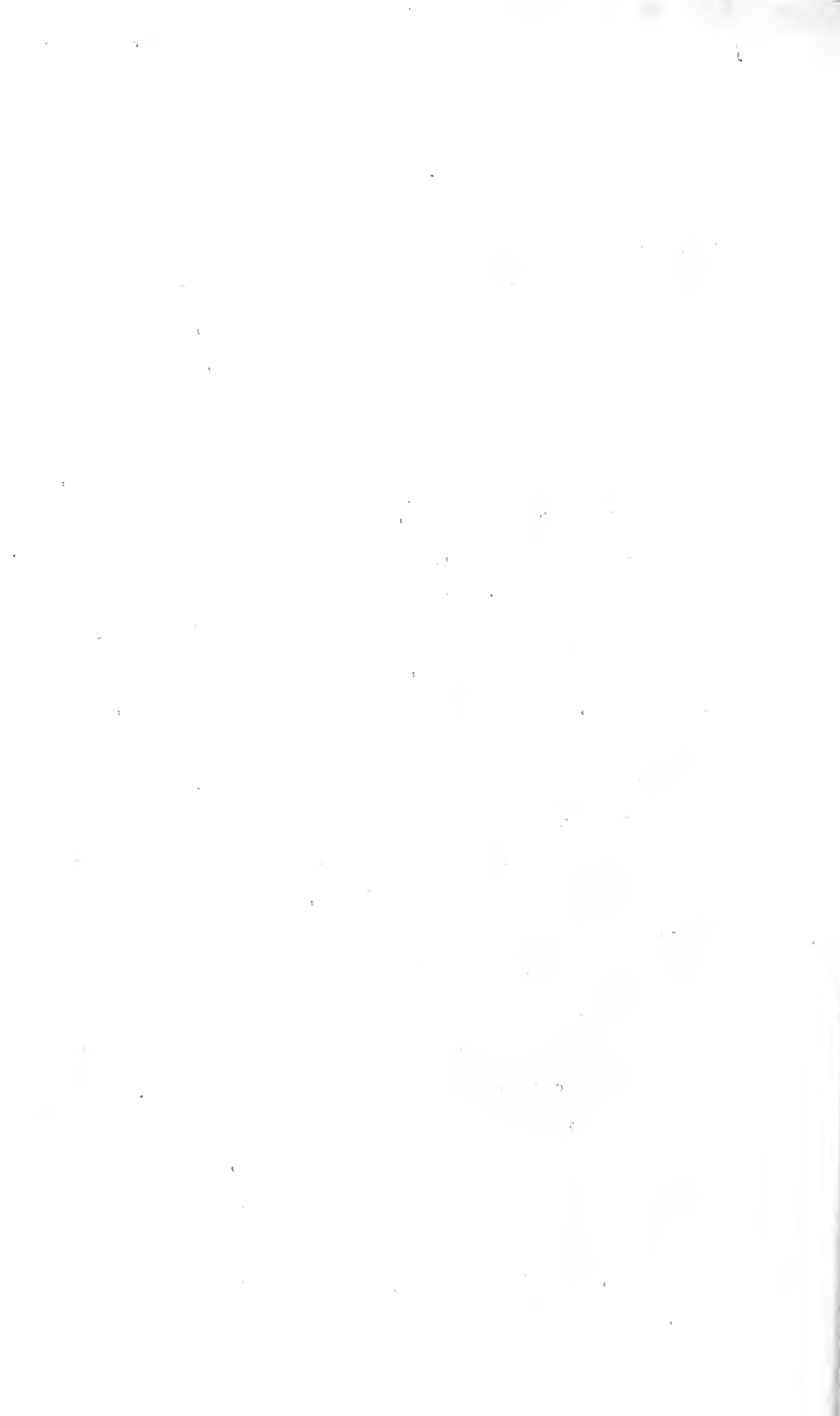
Appellee George Miller is the owner of a building property in the City of Alto, located at the corner of Second and Oak Streets, improved with a two-story brick building, fronting on Second Street. Appellant erected his building in the latter part of 1904. It is the evidence that prior to the time appellee erected his building, appellant had by contract secured a grade for Second Street, and the grade had been established, at its intersection with Oak Street, at a point five feet above the bench mark used in the establishment of the grade. The elevation above given is measured from the top of the curb then in place along the street.

It also appears from the evidence that appellee commenced building, he qualified as a contractor. Appellant to point out and mark the grade of the sidewalk in front of the premises. He also marked the premises with his instructions, and the same were as-

ted, and for reference, marked the grade with a stake in the ground. The engineer testified that he set the top of the curb of the existing sidewalk at the same level as the top of the curb of the proposed sidewalk, and that the ordinance introduced in evidence was not intended to have been the proper place. It was also testified that the ordinance introduced in evidence was not intended to have been the proper place for any building to be erected on the lot, and that the grade had been fixed, or established, by ordinance, and that the ordinance was introduced by the city engineer.

Appellee then proceeded to introduce evidence that a building, known as the "Building," had been erected, constructed a sidewalk in front of the building, and accepted by the City Engineer of April 1, 1901. It was testified at the trial that it had been constructed on the lot given. It appears from the evidence that the building and sidewalk were both completed, and that the sidewalk in front of the building was three inches above the surface of the ground in front of the building.

It further appears from the evidence that the building was erected by a certain local improvement ordinance, and that the ordinance provided for the construction of a new sidewalk in front of the building, and that the ordinance was accepted by the City Engineer of April 1, 1901. It was testified that the ordinance was accepted by the City Engineer of April 1, 1901, and that the ordinance was accepted by the City Engineer of April 1, 1901. Afterwards, the sidewalk was completed, and the building was accepted by the City, and such acceptance duly recorded in the City Court.



To the declaration herein, appellant filed one general issue, and also five special pleas. One of these and three are predicated upon the fact that the proceedings in the City Court of the City of New York, in connection with the petition and proceedings to levy and collect a tax for the construction of the sidewalk alleged to be the cause of appellee's damage, are not adjudicatory, and that all questions of benefits accruing or damages occasioned or caused by the construction of said sidewalk, should be determined, there are five set up the doctrine of a special tax, and are alleging in substance that appellee was a party to said special tax proceedings, duly notified as required by law, and that he had an opportunity to appear and that it was his duty to appear in said special tax proceedings and waive such damages to any damages which would be occasioned to him by the construction of said improvement; that the said special proceedings had jurisdiction to hear and determine the question of such damages, and that by failing to appear he cannot now appear and raise such question, and the Court accordingly found and adjudged that appellee could not recover damages by the construction of said improvement, and that he should be dismissed in accordance with such finding, and that such finding being now in full force and effect, and the same having been executed therefor, appellee is estopped to recover damages or of damages in this case.

Appellee demurred to these special pleas, and the demurrer was sustained by the Court. Appellee then stands by its pleas, and assigns as a reason therefor the Court in sustaining the demurrer.



for said improvement, as required by the ordinance. Nor is it averred that the defendant was notified by said local improvement board, or that said lot, or that any other property was ever called for by said board, or that any certificate was ever issued by said board, or that any assessment was ever levied on said property.

It is further certified by the court that the defendant, in respect of all the proceedings in relation to the local improvement act, and the assessment of the compensation to be paid to the plaintiff, was "damaged" in the making of the same. The defendant does not show that the proceedings in relation to the same were ever properly before the city council of the City of Alton, in the local improvement proceedings, or the opinion that the defendant's claim for compensation was properly sustained.

It is now urged that the plaintiff is bound by the allegations of the local improvement board, and the ordinances or portions thereof relating to the same, and for the reason also that the plaintiff has no right of recovery upon the ground that the defendant's building was damaged by the city engineer, the city board of public works, and another at a different and higher level, and that it contains that the ground on which the building was built was slightly lower, and that the plaintiff was damaged by the plaintiff. Upon the first ground, the plaintiff is bound by the



nance having re-affirmed that grade as the grade for the new sidewalk, and appellant's engineer testified that the top of the curb and grade, which is a trace of appellant, is stopped for evidence that the top of the curb is not the proper grade for the sidewalk. There was evidence tending to show that appellant's witness laid, it was claimed and testified by the City Engineer, and he testified that it was not, and there was no evidence to which can be said to be directed, or which we have seen and observed, which indicates that the walk was below the top of the curb were declared to indicate the grade of the sidewalk at this place. There was also positive evidence to be shown that this walk at the property line was below the curb and below the nose of the iron sill across the front of an elderly building; also that the new walk constructed by the City was some five or six inches above the top of the curb and sill. Even if it be conceded, that the new walk was not required to be constructed at the grade of the sidewalk of appellant's premises, and that in fact it was constructed slightly lower than such grade, it is apparent, when we consider the physical conditions disclosed by the facts, that some blunder was made, by some one or more persons at the place in question. Whether the grade was set by the City Engineer for his walk, and was not to be lower, or the City, in constructing the new walk, did not set the proper grade, and which exact relation it bears to the one, we cannot escape the fact that the City is responsible for the condition thus created.

building and walls to settle and crack. With no further with the condition of the premises, both of which were for a new walk was laid, were called and testified as to the differences in value before the new walk was laid, and although from their testimony, it would appear that the average value between 1937 and 1940 was approximately \$1410, a sum slightly less than the loss of value claimed by any witness surviving in the case. Under such circumstances it can hardly be said that in this respect the jury were actuated by passion and prejudice. It is, however, stated that appellant did not so 'provert the effect of the evidence as to the character of the injury which he had suffered upon him, or of their effect upon his valuation, nor did appellant call any witnesses to testify upon the question of depreciation in value, or to dispute the valuations testified to by the witnesses called by appellee. Under such circumstances it cannot be said that the jury in this case were governed by the only evidence before them upon the question.

We find no error in this record and we therefore affirm the reversal of the judgment herein, and it is accordingly affirmed.

And so.

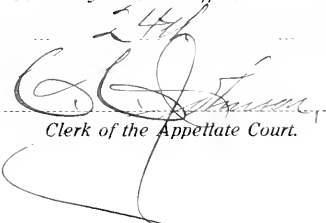
Not to be reported in full.

NOIN

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at M. Vernon, this ... 24th ... day of April,
A. D. 1917.


Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an *OPINION* in the words and figures following:

206 I.A. 158

Elijah H. Marteeny et al.,

Appellants

ERROR TO
APPEAL FROM

vs.

No. 66

October Term, 1916.

Circuit COURT

J. Warner Louth, as Commissioner
of Highways, etc.,

Appellees

Jefferson COUNTY

TRIAL JUDGE

HON.

J. C. EAGLETON

Term No. 66. In the said court, 1914. 7
Fourth District.
October Term, 1914.

Eljah J. Hartsany, et al, }
Appellants. }
vs. }
J. Warner South as Commissioner }
of Highways of town of St. Vernon, }
et al, }
Appellees. }

Case No. 100-1000
Court of Jefferson County, Ill.

Record, p. 10.

At the September Term, 1914, of the Circuit Court of Jefferson County, Illinois, a decree was rendered in the above entitled cause from which decree an appeal was taken and was taken to this court, and an opinion filed by this court at the October Term, 1915 thereof reversing and remanding the cause. The opinion rendered by this court is attached hereto and hereby referred to for the facts and issues involved in the cause.

It appears from the record that the decree now referred to as having been appealed from and which was rendered on the 28th day of September 1914, contained among other things the following provisions: "That Warner South shall not receive any money or compensation heretofore used in the construction of said road, and that he is hereby ordered to reimburse the said town for the money or compensation that he, the said Warner South, has received."

heretofore have received for the ... of
thirty days from this date". (This finding was contrary to
the decision of the Appellate Court but the case was
reversed and remanded for other reasons. This
was filed in the Circuit Court to the
which time appellants were given leave to file
bill making one Grant Irvin a party, who had been elected
as successor to ... Herbert Wilkinson to the office of ...
vicer of the town of
to this petition and leave given to amend the
the amended petition the demurrer was overruled.
demurrer had been overruled to the original petition and
while the case was still pending in the Circuit Court the
appellants offered evidence to show the amount of money that
had been received by J. Warner South, in violation of the
decretal order of the Circuit Court, and to fix the amount,
if any, due from the said South on account of the
received by him but the court refused to admit the
tion of this evidence and on the 11th day of July, 1911, ...
ordered another and further decree in said case
motion of appellees, which also provided,
J. Warner South should not receive pay for
nished to build the said highway; that
of highways out of the proceeds of the sale of said
shall pay for the work already done and
the highway, except for the work done
by the said J. Warner South". To the
the complainants excepted and do seek
by this appeal.

The appellants in their argument say, "It is observed that the decree appealed from, set aside the first decree in ordering said moneys restored to the bank and finding no specific sum due. This is the whole and only question presented by this record". In the opinion of the Appellate Court heretofore relied to, reversing the finding and decree of the Circuit Court requiring Smith to restore and pay back the moneys received by him and reversed and remanded the cause for other reasons but in reversing and remanding the case the court did not direct the receiver to hear evidence and determine the amount that was due from Smith on account of the moneys so received by him.

The contention of appellants is that a money decree in order to have validity must be for a specific sum. It is to have fixed a specific sum to be paid by Smith, and leave the matter subject to computation by some other person or body. The Circuit Court was the one vested with the power to determine this amount and could not transfer this to any other person. "The decree should have ascertained the precise amount that was required to be paid and not leave it to computation". *Smith vs. Trimble et al*, 27 Ill. 2, 1851. And again in the case of *Haras vs. Burton*, 71 Ill. 2, 1851, the court says, "The case of *Aldrich vs. Smith*, 2 Ill. 2, 1851, *Beckoli vs. Long*, 2 Ill. 67, and *Smith vs. Burton*, 71 Ill. 2, all hold that it is the duty of the court to find the amount due, and not to leave it to some other person. In this respect, is fatally defective. It is well established by the text books and other authorities that where a sum

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finding of the court.

be referred to the court

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not to be reported in 1911.

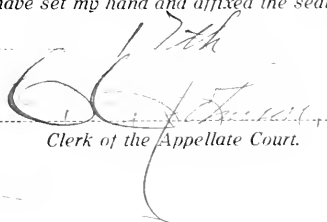
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at M. Vernon, this

17th day of April,

A. D. 1917.


Clerk of the Appellate Court.

NOINIC

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 164

Joe Baretti,

Appellee

vs.

ERROR TO
APPEAL FROM

No. 68

Circuit COURT

October Term, 1916.

Peter S. Theurer, Trustee etc.,

Franklin COUNTY

Appellants

TRIAL JUDGE

HON.

CHARLES H. MILLER

all that he may hereafter be indebted for said land, to be hereafter sold and delivered to him, the said land, shall be void. It further recites that the said land, at the time it was dry territory, under the local act of the State of Illinois, the appellant continued to ship and deliver to the said land, being practically all of the year 1880, and the said land, it is shown that most, if not all, of the said land, was shipped to Chicago and thence refilled by the appellant, and the said land, to the railroad company for the purpose of the said land, and some dispute as to whether or not the said land, was shipped to the appellee at West Frankfort. At the same time, the said land, the Franklin County Circuit Court, the said land, was set aside the mortgage as being void, and the said land, upon the appellee's title, and the said land, was set aside that the year was sold by the appellant to the said land, of the ordinance of the town of West Frankfort, and the said land, of the State of Illinois; and the said land, was set aside of none, if any, that any of the said land, was set aside was for intending, either sold or delivered, to the said land. Afterwards by an amendment it was also set aside the said land, for the cancelling of said mortgage, and the said land, indebtedness that the mortgage was set aside, and the said land, since been paid and cancelled by the appellant.

The appellant then claims that the said land, of the mortgage was set aside, and the said land, there was then due upon the said land, and the said land, that the said land, were made to pay, and the said land, of Chicago, State of Illinois, and the said land, by due from appellee to appellant, and the said land, and the said land,

parties out nothing that appears to be a... of the orders sent under my... shipped in pursuance to that... freight, it was paid by the applicant, the... from the purchase price of the deer in the... tances. Counsel for a defendant... objections to the decree rendered by the... among them, and as we think, did not... whether or not this indebtedness... definite indebtedness has been fully paid, and... was not indebted to applicant, then we can... why the mortgage should not be satisfied... the question of the amount of deer purchased, and... of payments made, and deer purchased, is very... not presented in a manner, or the facts are... either in the abstract or in the... court to tell whether or not the... testimony was correct in finding that the... pellee had been fully paid, so that was... such finding was manifestly... The chancellor saw the witnesses, he... doubtless made computations of the... statements furnished upon the trial... pointed out by counsel at the time... could understand them, and he... ness has been paid and he... that finding. It is... pellee was indebted to a... \$684.55 for a check that...



fused by the bank. This was on January 11, 1934, but we know that were paid to the bank and four thousand dollars for the and we can not say in the wrong in holding the money.

It is also noted by the bank offered in evidence, which is of 184.34 and that the bank, Company, testified that the was 12317. but the witness did not keep the books or receive the given him are obtained from the personal knowledge of the transactions could not have had such right with the bank.

It is also noted that the book offered in evidence by the bank of 184.34 was due. It contains from witnesses for appellant that there was the book keeping department of the customers ledger with leaves fastened witness says that he did not receive the entry upon these ledger leaves. This is to by counsel for appellant on the to the objection, and the court sustained the final hearing that the were not account. There is no testimony that and the entries were made by the witness, so that the entries were they were made by the deceased.

they were made in the usual course of business. It is to us that testimony of this character can be given for the purpose of proving, under a statute, an agent statute.

Lastly, it is said that the bond was canceled because it was for the covering of a debt, and a continued obligation and covering sales that were made in the future. There is no time specified in the bond of the extent of sales that are to be covered by the bond. It seems to us that if the parties said that the appellant did not desire to further continue business with the appellant that he was entitled to have his bond and deed discharged.

It appears to us that counsel for appellants in preparation of their abstract and the presenting of the facts that they claimed to be involved in their case have neglected to classify and present the different classes of evidence in such a manner as to enable this court to see clearly the real condition of the several transactions between these parties. It appears to have been left to the court to go through the several items and report on them, which we find it impossible to do owing to the manner in which the abstract is prepared and presented.

Under all the circumstances in this case, we are prepared to say that the finding and decree of the circuit court was manifestly against the weight of the evidence. We find that the indebtedness was paid and that the court can see no reason for disturbing the decree upon the other grounds urged by appellant, even if other be valid, and the decree of the circuit court is affirmed.

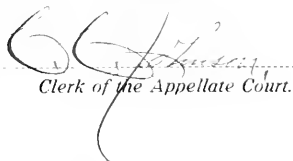
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this .
A. D. 1917.

16th

day of April,


Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Ldna Miranda,

Appellee

vs.

No. 69

October Term, 1916.

City of Collinsville,

Appellant

206 I.A. 166

ERROR TO
APPEAL FROM

Circuit

COURT

Madison

COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW



Term No. 69.

In the County of Clark,

Fourth District.

October Term, 1911.

Adna Miranda,

Appellee.

vs.

City of Collinsville,

Appellant.

Appeal from the Circuit Court
of Jackson County.

Corpus, et c.

This cause was heard by the court and a jury and judgment rendered in favor of the appellant for ten hundred dollars.

It is contended by counsel for the appellant that the city of Collinsville was not guilty of negligence and that the appellee was not in the exercise of due care for her own safety. It appears from the evidence that the street in the city of Collinsville extends east and west through the city, and that the side walk where the injury occurred was on the south side of the street and the property of the complainant was immediately in front of the residence of the appellant. The appellee and the appellant, Mrs. Cure, were traveling in a westerly direction on the side walk and at or near the residence of the appellant a lady traveling east. As the lady was approaching the meeting of this lady they both stopped and the appellee pass by them and upon turning to the east she was struck by the side walk appellee's car struck the lady and she was killed.



in the outer edge of the side walk upon which she stepped and stepped in to a hole near by and fell and the force of this fall received the injuries of which she died. The pipes project up above the side walk the pipes are about six inches and close to these pipes there were holes in the depth of six or eight inches later which she fell and she tripped upon the pipes. The evidence shows that the side walk was constructed of brick and that the outer edge of the walk the brick were set at an angle and stepped slightly above the wall and that these bricks were set along immediately against the brick, for in fact, in fact, in a line with it and constituted a part of the side walk, which was of the width of about five feet. The evidence of appellant tended to show that the pipes were located just outside of the walk but we think a preponderance of the evidence shows they were located as above described. The evidence tends to show there was an electric light in the building hundred feet but evidence of the witnesses tends to show that the place at which the injury occurred was not well lighted and they were not able to see the pipes distinctly at this point. It appears from the evidence that appellant was at this time pregnant and that the fall and injury had a miscarriage and was confined to her bed for several months and that at the time of the trial she was unable to testify. It is not contended that the defendant was negligent.

We do not believe the evidence tends to show that appellant was guilty of negligence and that she was in the exercise of due care at the time of her fall.

The side walk in question was upon one of the public streets of the city of Baltimore, and it had been there several years, and it was about six inches above the side walk, and the court was justified in finding that the city was negligent in not remedying it. The very fact that the plaintiff and her companion were traveling along the walk in the city, and traveling and driving at a body of the city, and to turn out to allow her to pass and drive, and the fall would justify the court in concluding that the projecting so far above the walk were negligent and were traveling thereon. In the case of the city of Louisville vs. Stauff, 98 App., 418, the city permitted a structure to project two inches above the level of the sidewalk and the plaintiff while passing along the sidewalk, and she fell to the wall, tripped and fell upon it, and the court held that it was negligent and it was negligent to permit this "stauff" to project above the level of the sidewalk, and also held that although the plaintiff was negligent with the wall, but had no acquaintance with the wall, that she was in the exercise of due care, and the case was appealed to the Supreme Court and the court affirmed the judgment, 111, 335. Many other similar cases have been decided by our courts as showing negligence, and it is a well known fact that had been just outside of the city, and the court held that we do not believe that the city was negligent in not having the steel pipes to project above the level of the sidewalk,

they did, and in such close proximity to it. In the case of Brennan vs. City of San Francisco, 100 Cal. 2d, 100, where a box three and one-half inches high and one inch wide projecting above the surface five inches above the ground, the court says it cannot be said that the city was negligent in such obstruction is of such a character as to constitute the city of negligence in permitting it to exist on the sidewalk where it might become a menace to persons using the sidewalk with ordinary care. In the case of Island vs. Larkin, 136 Cal. 2d, 136, the court held that a valve box located four inches south of the sidewalk and projecting five inches above the ground did not constitute negligence upon the part of the city: one of the factors in other cases where, under conditions that could be so arise, an object of this character might be considered a public travel, and that it is negligence to permit such objects to exist in the streets. In this case the steel pipes were permitted upon one of the main streets of the city, and one such traveled as indicated by the evidence.

It is also contended by counsel for the city that the plaintiff was not in the exercise of due care for her own safety. It is true that the evidence shows that she was walking along this walk frequently, she had never observed the pipes in question and that she did not see them until she was struck, and the evidence tends to show that the light was sufficient to permit her to see them. The width of the sidewalk was five feet and while she and her companion were traveling along in the usual and ordinary manner of travel they met another lady and in turning out to order to give her

an opportunity to pass by them the appellee suddenly struck her foot against these pipes and fell, and the testimony is that she did not know the existence of the pipes and we are unable to say that under these conditions that appellee was not in the exercise of ordinary care for her own safety, and we are well satisfied with the finding of the court that she was in the exercise of due care for her own safety, and we think this doctrine is well sustained by the case of the City of Maylowville vs. Radford, supra. The court heard the testimony of the witnesses in open court and was better calculated to judge whether or not under the particular conditions that existed the appellant was negligent or that appellee was in the exercise of due care and unless the facts developed would show as a matter of law that such negligence or due care did not exist then we would have no right to disturb the finding of the court and we can not say as a matter of law that the appellant was not negligent or that the appellee was not in the exercise of due care for her own safety.

It is next insisted by counsel for appellant that notice of the time, place and circumstances of the injury was not served upon the proper person and therefore no right of action existed. The statute provides that when any person is about to bring an action against a city or village he must file in the office of the city attorney, if there is a city attorney, and also in the office of the city clerk, a statement in writing signed by such person, and the Supreme Court, in the case of *Holden vs. Board of Directors*, 147 Ill. 502, in passing upon this statute says, "We are constrained to hold that the city attorney



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

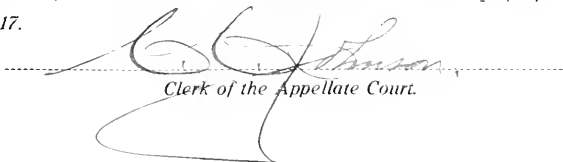
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ..

24th

day of April,

A. D. 1917.


Clerk of the Appellate Court.

NOINI

106 A. 116

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 168

Village of Ina, Illinois,
by O. T. Shinn, a tax payer,
Appellant

ERROR TO
APPEAL FROM

vs.

No. 72

October Term, 1916.

County COURT

F. E. Kelley,
Appellee

Jefferson COUNTY

TRIAL JUDGE

HON.

R. E. HICKMAN



Form No. 74.

In

at

dated

Village of Br., Illinois,
by C. C. Bion, Mayor,
President.

vs.

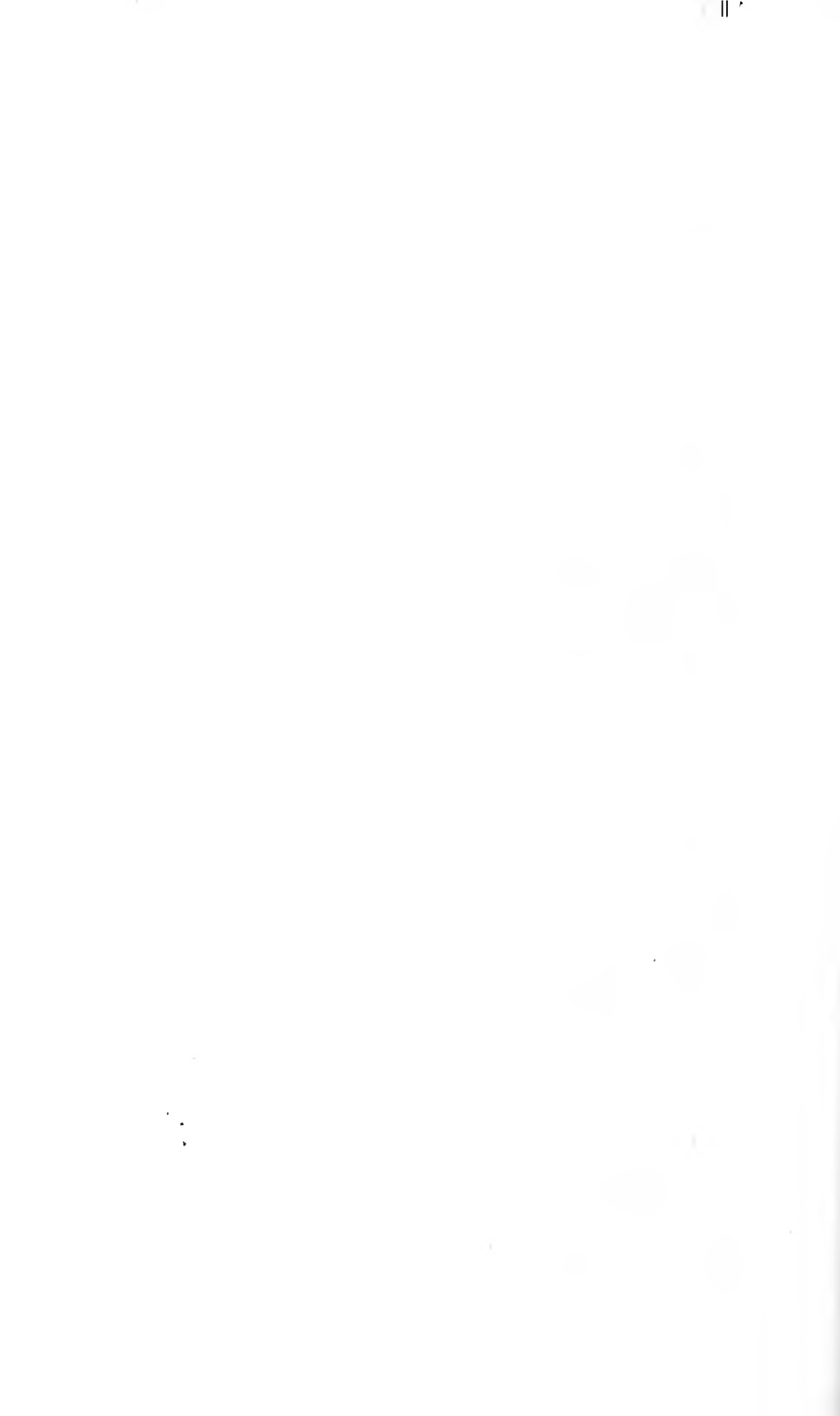
C. C. Bion,
Defendant.

to wit: C. C. Bion.

It appears from the facts as set forth and contained in this record that the said C. C. Bion, Mayor and President of the Board of Trustees of the Village of Br., Illinois, has prohibited the sale of liquors within its limits and that the said C. C. Bion, Mayor, is aware of the fact that some persons are engaged in the lawful sale of liquors in said village. At the time of the making of the said order, the said C. C. Bion, Mayor, had evidence to convict those violators of the said order. He employed C. C. Bion of the Chicago Police Department to ferret out such violations and without success. He secured an appropriation, and it was used for the purpose of authorizing him to go to the village of Br., Illinois, upon the village treasury or said village funds to the amount of \$10,000, and said C. C. Bion, Mayor, further ordered that after the making of these orders, no person should be allowed to present his wife to the village for all time at the village of Br., Illinois.

the majority of the board to void the same. The claim it was rejected. It is admitted by the defendant that he obtained this money from the village treasury by means of signing warrants upon the treasury and presenting the same for payment, which were paid. This was done in violation of the law, a tax payer, against a village to recover this money for the village under section 37, chapter 34 of the Revised Statutes, which provides a liability on the part of any tax payer in the name and for the consent of the city or village, against any person or corporation to recover the money or property belonging to the city or village, or any money which may have been paid, advanced or expended without authority of law. A trial was had in the Circuit Court and judgment rendered against the defendant, which it now seeks to reverse by this appeal.

The first question that arises in the mind of the court of this case is whether or not the money so paid to the defendant was paid to him without authority of law. The court is convinced from the reading of this record that he had no authority whatever to secure this money from the village treasury. Section 41, provides that before any liability can be incurred against the village that such liability must be authorized by a majority of all the members elected, and that there must have been an appropriation in the manner provided by statute before the money could be lawfully paid out of the treasury. Neither of these things was done. It is said that no appropriation had been made and no order given by the board of trustees authorizing the payment of the money. It is said if any liability existed at all that Sullivan was the man that finally received the money and the city was



have been against him. He could, by diligent search, find the money in the treasury and pay it to the plaintiff. He could sell from such act by paying the money to the plaintiff. He were liable. The plaintiff is not liable for the money and it is immaterial whether the money is unlawfully obtained he is liable for it.

Appellee also contends that the justice of the peace would not give him the money. He has a claim against the plaintiff for the unlawful means by which he obtained it, and the recurring of the money is due to him, and the debt, by him to the village and the justice of the peace has jurisdiction.

It further appears from the evidence that there were two suits brought by the plaintiff against the defendant for the recovery of the money. It appears that the parties to the suits were the same. There was a different party in the latter suit in the former. The suit in the former was returnable July 21, 1918, and the suit in the latter was returnable on July 27, 1918. When the trial of the former suit was called on, the plaintiff was ready for trial. Whereupon, the justice of the peace, on motion by the defendant, granted judgment for the defendant on the ground of want of jurisdiction, motion was made, and appeal prayed by the plaintiff. The order entered by the justice of the peace that suit for want of jurisdiction is hereby affirmed.



of the rights between these parties is in favor of recovery by appellant Garcia. He also holds that says that as this was commenced first recovery and as the suit was dismissed that the plaintiff is not from a recovery. If it is to be taken as a rule of law appear that there is an identity of parties and subject matter, and in speaking upon this subject the court says, "It must be shown that the cause of action is the same in both proceedings, and in which, although the particular form of action may not be important, there must be, as between the two actions, identity of parties, of subject matter and cause of action". *Crack vs. Lloyd*, 93 Cal., 126. It is said, "Where the former adjudication is relied upon as an absolute bar, there must be, as between the two actions, identity of parties, of subject matter and cause of action. There is, however, a clearly defined distinction between that class of cases and where some controlling fact or matter material to the determination of both causes of action adjudicated in a former proceeding in a court of competent jurisdiction, and the same fact or matter is again litigated between the same parties. In this latter case the result of the fact or matter in the first suit will, if properly presented, be conclusive of the same question in the second suit, irrespective of whether the cause of action is the same in both suits or not. This is generally known as the estoppel by verdict". *Clark vs. Boardman*, 10 Cal., 321. The same doctrine is announced in *the case of the People v. C.B. & N.Y. Co.*, 47 Cal., 543. It is true that in an adjudication if the proceedings were such as to determine the fact have been determined, and were not in fact determined, that



this under proper conditions would constitute a bar. If in
case it is admitted that the parties were not identical, and
it further appears from the record that the action now
presented was not presented in the suit dismissed by the jus-
tice of the peace for want of jurisdiction. It is not within
the authorities that to constitute a bar of jurisdiction there
must have been a trial and a determination on the merits of
the parties but no such thing occurred here. It will be ob-
served that this order entered by the justice of the peace
was before any trial was had, and upon the motion by the de-
fendant to dismiss the suit for want of jurisdiction. It is
not understood that a mere order dismissing a suit can either
be pleaded in bar or in estoppel. It has been said by the su-
preme court, in speaking of a dismissal of a former suit, that
the invoking of that to defeat another action lost, these
objects are accomplished by construing the statute to mean
that where a suit is brought before a justice which results
in a final judgment on the merits, there both parties shall
be precluded from further litigation in relation to the mat-
ters that might have been decided in that case. This is the
of the first case tried by the justice was in effect a
suit and did not bar the bringing of a new suit for the same
cause of action, and consequently could not bar or prevent
another suit for a different cause of action. See *Boyd v.*
Finch, 1st Conn. 157. And the same principle is applied in
the case of *Irish et al vs. Lupton, et al*, 10 Conn. 333.

We are of the opinion that the plaintiff is entitled to
that the appellee unlawfully obtained money from the village
treasury of the village of Inn and that the dismissal of the
former suit would neither bar or stop the plaintiff from re-
covering in this proceeding, and the judgment of the lower
court is reversed and the cause remanded.

1. Lupton, et al vs. Irish, et al

The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) and (2). It is shown that the system has a solution if and only if the matrix A is nonsingular. This is proved by the method of the adjoint system.

In the second part of the paper the problem of the stability of the solutions of the system (1) and (2) is considered. It is shown that the system is stable if and only if the matrix A is positive definite. This is proved by the method of the Lyapunov function.

In the third part of the paper the problem of the asymptotic stability of the solutions of the system (1) and (2) is considered. It is shown that the system is asymptotically stable if and only if the matrix A is positive definite and the matrix B is nonsingular. This is proved by the method of the Lyapunov function.

In the fourth part of the paper the problem of the controllability of the system (1) and (2) is considered. It is shown that the system is controllable if and only if the matrix B is nonsingular. This is proved by the method of the Kalman rank condition.

In the fifth part of the paper the problem of the observability of the system (1) and (2) is considered. It is shown that the system is observable if and only if the matrix C is nonsingular. This is proved by the method of the Kalman rank condition.

In the sixth part of the paper the problem of the stabilizability of the system (1) and (2) is considered. It is shown that the system is stabilizable if and only if the matrix A is positive definite and the matrix B is nonsingular. This is proved by the method of the Lyapunov function.

In the seventh part of the paper the problem of the detectability of the system (1) and (2) is considered. It is shown that the system is detectable if and only if the matrix A is positive definite and the matrix C is nonsingular. This is proved by the method of the Lyapunov function.

In the eighth part of the paper the problem of the stabilizability and detectability of the system (1) and (2) is considered. It is shown that the system is stabilizable and detectable if and only if the matrix A is positive definite, the matrix B is nonsingular, and the matrix C is nonsingular. This is proved by the method of the Lyapunov function.

In the ninth part of the paper the problem of the stabilizability and detectability of the system (1) and (2) is considered. It is shown that the system is stabilizable and detectable if and only if the matrix A is positive definite, the matrix B is nonsingular, and the matrix C is nonsingular. This is proved by the method of the Lyapunov function.

In the tenth part of the paper the problem of the stabilizability and detectability of the system (1) and (2) is considered. It is shown that the system is stabilizable and detectable if and only if the matrix A is positive definite, the matrix B is nonsingular, and the matrix C is nonsingular. This is proved by the method of the Lyapunov function.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this .

day of April.

A. D. 1917.

Clerk of the Appellate Court.

NOINI

3

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Ada I. Ferrell,

Appellee

vs.

No. 76

October Term, 1916.

Southern Illinois Railway & Power Co.,

Appellant

206 I.A. 169

ERROR TO
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON.

A. E. LAMIS







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was an additional element of injury to the plaintiff's business.

It is, however, the duty of the jury to determine the amount of damages to be awarded in this case.

The jury subject with reference to the evidence presented and the facts of the case.

It is the duty of the jury to determine the amount of damages to be awarded in this case.

Such evidence of the plaintiff's business is not sufficient to establish the amount of damages to be awarded in this case.

It is the duty of the jury to determine the amount of damages to be awarded in this case.

It is the duty of the jury to determine the amount of damages to be awarded in this case.

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It is the duty of the jury to determine the amount of damages to be awarded in this case.

It is the duty of the jury to determine the amount of damages to be awarded in this case.



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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ..
A. D. 1917.

20th

day of April.

CC Johnson

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 192

Willis Coal & Lining Co.,

Defendant in Error

ERROR TO

APPEAL FROM:

vs.

Circuit

COURT

No. 5

October Term, 1916.

Missouri & Illinois Coal Co.,

Plaintiff in Error

St. Clair

COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW

Term No. 6 In the Circuit Court of Missouri, Fourth District,
October Term, 1916.

The Illinois Coal Mining
Company,

defendant in error

vs

Missouri & Illinois Coal
Company,

Plaintiff in error

Error to Circuit Court

St. Clair County.

Union of Co. 8, 3.

This writ of error is prosecuted to reverse a judgment in favor of defendant in error (hereafter for convenience called appellee) and against plaintiff in error (hereafter called appellant) in the case of 734.18 rendered by the Circuit Court of St. Clair County for 1949 tons of coal alleged to have been unlawfully mined by appellant from lands owned by appellee.

The amended declaration upon which the case was tried consisted of the consolidated common counts, with which was filed the following account:

| | |
|---|---------------|
| "For 1949 tons coal mined unlawfully from June 1, 1914, to Oct. 1, 1916, from the Illinois Coal Mining Company's coal land, Petric tract, at \$1.00 per ton at local mine, less cost of hauling, transportation, hoisting and dumping, estimated at 40¢ per ton (1949 tons at 40¢)..... | 734.18 |
| Less amount paid for royalty by Missouri & Illinois Coal Company from June 1 to Oct. 2, 1916, (1890 tons at .044¢)..... | 47.44 |
| | <u>686.74</u> |

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Appellant in 1942, 1943 and 1944.

Special Plea that it did not actually take credit for certain materials furnished by defendant for coal furnished or sold. This is a separate and distinct issue of merits. Issue was joined on this issue, and a resolution was filed by defendant's special plea. In the plea of recalculation, defendant stated that it had given credit for the sum of \$1,000.00 for coal furnished, and admitted the amount of \$1,000.00. The case was tried on these issues by the court, and judgment was given by said parties, the judgment being in favor of \$742.19.

It is first insisted by appellant that the finding and judgment of the trial court is against the manifest weight of the evidence, and that the judgment should be reversed for that reason. The parties to this suit were both engaged in the business of mining coal at Illinois, Illinois, among other places, and had had business dealings and contract relations for many years before this controversy arose. On May 12, 1942 the parties entered into a contract or license, revocable at the pleasure of the licensor, granting certain mining rights to the licensee in lands owned by the licensor. This contract or license was a license to take coal from certain tract known as the "Rich tract."

It was represented by the parties to the contract that under license the defendant was authorized to mine and under

the Petrich tract then, appellant admits that after the execution of the contract of May 20, 1914, it mined coal under the Petrich tract as contemplated by appellee, and further admitted that the amount of coal so mined was not more than the amount specified in appellee's copy of said contract. Appellant further admits that under said contract it had no view of right to mine under said tract or to be paid for it and no further right therein. Appellant contends however that the fact that it did so mine coal and bring to appellee through its officers and agents a certain amount thereof with full knowledge that it was so doing, was a breach of said Petrich tract.

It is further contended by appellant that if appellee had knowledge of and acquiesced in the mining of coal by appellant under the Petrich tract after May 20, 1914, that all appellee would be entitled to under the lease, the amount of royalty paid under the appellee lease. On the other hand appellee contends that it had no knowledge that appellant was mining coal under said tract after the execution of the contract of May 20, 1914 until some time in the latter part of September or the first part of October, 1914.

The evidence discloses that beginning in June, 1914, appellant rendered statements to appellee and coal purchased by appellee from appellant, in which a certain credit was given appellee of \$100.00 per month for coal mined by appellant under the Petrich tract. These credits were received by the book keeper of appellee but the evidence fails to show that knowledge of these credits or royalties



were brought to the knowledge of the appellant until the defendant on October 10, 1915, as above set forth.

The burden of proof is on the appellant to show by the evidence that appellee, the defendant, had knowledge of and acquiesced in the execution of said contract, and unless it has done so, the contract is null and void. The contract is null and void because it is declared null and void by the defendant from appellee is fraud and is illegal. The contract is as follows:

"It is mutually agreed between the parties herein that all of the leases, contracts, licenses and agreements in writing required to in the premises herein, the said preamble is is hereby expressly referred to and made a part of this agreement and each of them as hereby canceled, annulled, set aside and they are to be of no further force or effect, and they shall not hereafter be given any right, power, privilege, benefit, duty or liability in law or equity against either of the parties herein."

and, therefore, hold that the defendant is not sufficient to show a waiver by appellee of the contract of the contract of any part, but, the defendant is not sufficient to establish an intention to relinquish it. The defendant is not sufficient to show the defendant's knowledge of the effect of the contract and its intention to relinquish it. The defendant is not sufficient to show (2nd ed) vol. 10; page 111, Martin v. Barker, 121 U.S. 111.

The law further is that a waiver will not be implied from slight circumstances, but must be evidenced by an unequivocal and decisive act, or a sign thereof. If the act is not of such a character, it is not consistent with the enforcement of the right and it is not a waiver, or an intention to rely upon it, as matter is established. American & Eng. Ins. Co. v. (1884) 111. 10, page 110; Amador v. Insurance Co., 111. 11.

It is further contended by appellant that the bookkeeper of appellee who received the order and was aided by appellant above mentioned and which disclosure of it if it was not on the coal taken from the parish tract should be held to be notice to appellee. Where notice through an agent is relied upon the nature of the agency must be such that the law will presume that the agent carried the notice to his principal or it must be established as a fact that the agent communicated to his principal such notice. Williams v. (1884) 111. 107. Home Bank v. (1884) 111. 14.

The evidence in the record does not show that it was the duty of the bookkeeper to inform the managing officers of appellee with reference to the credit referred to, neither does the evidence disclose that such bookkeeper did in fact inform the managing officers of appellee with reference thereto, and in either case, appellee would not be held to have received such notice.

It is further to be observed in connection with the question of notice, that the parish tract is not referred to as such in any of the reports or statements. All

that the reports or statements disclosed were that a credit of 2 1/2 per ton was given or to certain coal mined by appellant, but as to what tract said coal came from it nowhere appears. It is argued by appellant that the only tract it had ever paid 2 1/2 per ton on was the Petrich tract, and that therefore, that of itself, would bring the office to suspect that said coal came from said Petrich tract. Indeed, even if this is so, it is still the duty of the managing officers of the office, to be sufficient to charge appellee in consequence of the fact that the record does not present this question. In fact, it is even, that this information to the Petrich tract is under the evidence in this case that it is the duty of the office as there is nothing in the evidence to show that the coalkeeper had any knowledge with reference to where the coal was being taken from that was being mined by appellant under lands owned by appellee.

The evidence further discloses that one H. Stewart, an engineer in the employment of appellee, while in the latter part of August, 1914, was employed by appellant, with appellee's permission, to make a coal survey, which survey disclosed that appellant had been taking coal under the Petrich tract. It is argued by appellant that the knowledge possessed by said engineer that he was taking the coal to appellant, was not given by appellant, and that the police would therefore not be charged with the knowledge of the facts that came to the knowledge of the agent of appellee in making said survey and not acting on its behalf.

It is next insisted by appellant that the judgment rendered by the trial court was excessive. The evidence discloses that credit was given by appellee for the \$11,000 claimed by appellant as a set-off and also that appellee gave credit on the trial for the \$4,000 and certain other items claimed by appellant. The only question remaining, then with reference to the size of the judgment is as to whether or not the finding of the court was reduced to the value of the coal taken from appellant's lands after deducting the charges of mining and loading, etc. here, for depreciation. The record discloses that on all occasions buying all of appellant's coal at \$1.50 per ton and that that is the amount that appellee is seeking to recover from appellant for the coal taken. Appellee is the owner of amount such in credits appellant was entitled for mining, loading, carting, etc. The trial court gave to appellant a credit it seems of \$54 per ton for the expenses in connection with the mining, etc. of the coal taken and gave judgment to appellee for eight times the net value of the coal taken. The evidence as to the expenses of mining, or transportation, carting, loading, etc. of the coal mined is conflicting and we are not able to say that the finding of the trial court on this controverted question of fact was against the preponderant weight of the evidence. Not being able to do so, we should not disturb the judgment on that account. See *Miller vs. Brazier*, 157 Ill. 587; *Gillette vs. Appleton*, 120 Ill. 311.

Next, it is insisted by appellant that the court erred in refusing certain propositions or principles submitted by it on the trial of said cause. All of the propositions of law submitted by appellant and which were either refused by

the trial court were retract in law, and for that reason, if for no other, there was no error in the court refusing to hold the same. We find, however, in reading the record in this case that the court left to the jury, without instruction and without propositions of law, certain propositions. Said propositions would tend to show that the law in this case and appellant are in error, as alleged by the reversal of the trial court to have been the law. The propositions stated reflect, even though they are even otherwise proper.

Finding no reversal or error in this case, the judgment will be affirmed.

and that affirmed.

Not to be reported in full.



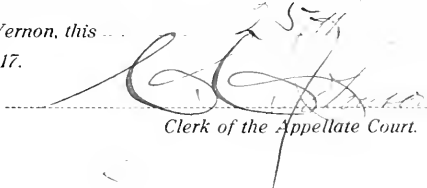
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ...

day of ~~April~~ ¹¹ 1917

A. D. 1917.


Clerk of the Appellate Court.

NOINI

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Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Belle Duncan,

Appellee

vs.

No. 16

October Term, 1916.

Louis E. Kammeier, et al,

Appellants

206 I.A. 207

ERROR TO
APPEAL FROM

Circuit

COURT

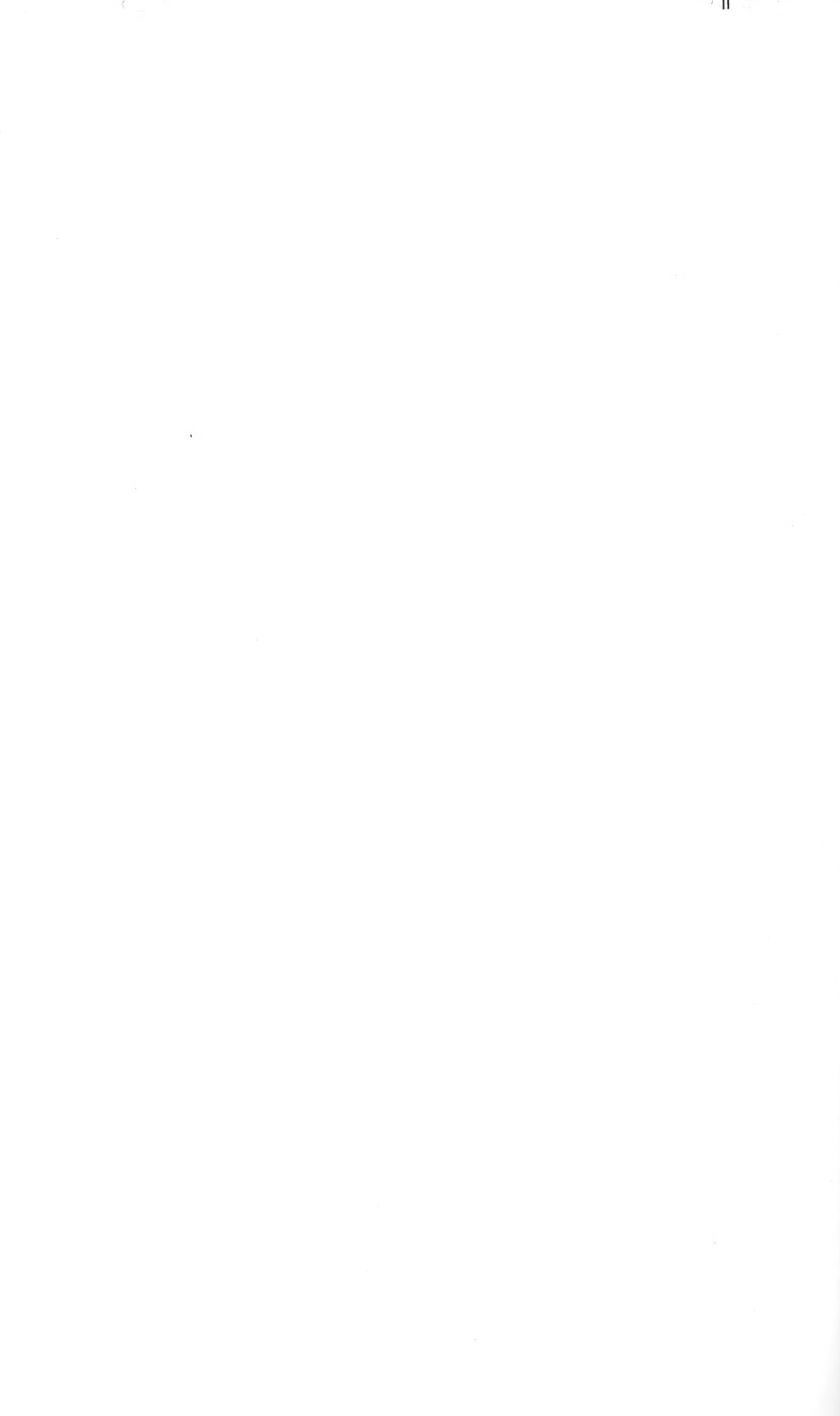
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22. 11. 1917.

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In action 11-2-2008

69

Direct and indirect in the sense that

The provisions of 102-111 are as follows:

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1956 Report of the Board 13, 141

1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 26

14 years in 1946 or is not covered by

There is a correlation and the effect is as follows:





working for him fair and square.

Gave him ten cent for the day's work.

The children

once they had to go to school, they were not allowed to

play any more, and they were not allowed to

receive any more of the same kind of work.

One day, when he was working for him, he was

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The record of the day

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knew that [redacted] [redacted]

other words that the jury was not to be misled by the
loving them to answer the question of the meaning of the term
"loving them" as it is used in the will. The jury should have been
instructed that the word "loving" as used in the will is to be
construed in its ordinary meaning and not in its technical meaning.

It is not sufficient to say that the jury was instructed
on the meaning of the word "loving" and that the jury was
instructed that the word "loving" as used in the will is to be
construed in its ordinary meaning. The instruction was the
instruction that the word "loving" as used in the will is to be
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meaning. The instruction was the instruction that the word "loving"
as used in the will is to be construed in its ordinary meaning.



but one side of liquor by another, and in connection, there was no occasion for the instruction about the same.

Appellant's first error was in instructing the jury that they cannot make the law, and that what we have said above is the law. This is a correct instruction. The next error was in instructing the jury and there was no error in instructing the jury, and was covered in effect by the instruction that there was no occasion for repeating the same.

Lastly, it is objected that the instruction is excessive, but as this case is not a precedent, there is no occasion for discussing this assignment of error. It can then be said that the verdict, in view of the facts, the record was a substantial one.

For the reasons above set forth, the verdict is reversed and the cause remanded.

Reversed and remanded.

Let the record be restored in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

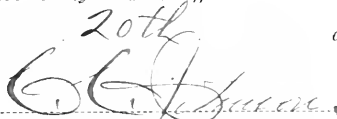
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this..

20th

day of April.

A. D. 1917.



Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The Toledo, St. Louis & Western
Railroad Co.,
Plaintiff in Error

vs.

No. 24
October Term, 1916.

East St. Louis & Suburban Ry. Co.,
Defendant in Error

206 I.A. 216

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW

Term No. 84. In the (Special Term) Term No. 14
of the Circuit Court of the District
of St. Louis, Missouri.
October Term, A. D. 1910.

| | | |
|---------------------------|---|-------------------------------|
| St. Louis & Eastern |) | |
| Railroad Company, |) | |
| Plaintiff in error |) | |
| vs. |) | error to the Circuit Court of |
| East St. Louis & Suburban |) | St. Clair County, Illinois. |
| Railway Company, |) | |
| Defendant in error |) | |

Opinion by Judge, J.

On October 7, 1910, a contract was entered into between plaintiff in error, Toledo, St. Louis & Eastern Railroad Company, with the Mississippi Valley Transit Company for the purpose of permitting said Transit Company and its agents to cross plaintiff in error's right of way and tracks on the line of the public highway crossing, west of St. Louisville. The rights and privilege acquired by the Mississippi Valley Transit Company was thereafter assigned to the defendant in error, East St. Louis & Suburban Railway Company.

Said contract contained various conditions, but it will only be necessary for us to consider the fourth and seventh sections of said contract. Section four provided that the second party (Mississippi Valley Transit Co.) will bring all of its cars to a full stop before attempting to cross the tracks of said first party (plaintiff in error).



and said cars shall remain standing until the conductor in charge of said car of the second party, in accordance with the provision herein provided, that the first party of the second party assumes full responsibility for the proper maintenance and operation of the crossing, and will indemnify and save harmless the said first party, its heirs, assigns, successors and assigns, against all loss, damage, claims, expenses, actions, claims or demands whatsoever, which either they may at any time suffer or be obliged to pay, for any reason of the condition of the crossing or for any other cause, and said second party to indemnify or vice versa for any breach of this contract".

At a point just south of the city limits of Louisville the Mitchell and Madison streets crossing is laid in an easterly and westerly direction, and intersects the St. Louis & Suburban Railway track which is also laid out in an easterly and westerly direction, a public highway, extending out of Louisville. At a point about fifty feet south of the railroad track are the tracks of Louisville & Suburban Railway which run in an easterly and westerly direction. In order the five tracks at the point in question. The distance between each track being about fifteen feet, and all of which tracks intersect the city road and extend it in error's suburban track.

At about 4 o'clock P. M. on April 1, 1904, an electric car operated by defendant in error was running southerly direction on the street by which it was approaching into it from the west on the south track of defendant in error's railroad, at the crossing above mentioned, crossing



the rear truck of the car of the plaintiff in error, and the plaintiff in error was severely injured in this collision. On the 10th day of November, 1911, the City Court of St. Louis, Missouri, brought suit against plaintiff in error and defendant in error to recover damages for the injuries suffered in this collision. The suit was removed to the Federal Court by plaintiff in error, and during the trial said suit was dismissed as to defendant in error. A verdict was rendered against plaintiff in error for \$1,000.00, from which verdict judgment was rendered.

At the January term, 1914 of the City Court of St. Louis plaintiff in error brought suit against defendant in error on the above mentioned contract to recover the amount of the judgment, interest and expenses incurred in connection with the suit brought by Anna Synecio, in which judgment was rendered in the Federal Court.

The declaration consisted of seven counts. The first count was sustained to the third, fourth and fifth counts. A plea of the general issue was filed to the first three counts, all of which were predicated upon an alleged breach of the provisions of section 4 of the contract above set forth. The case was tried twice in the City Court of St. Louis, resulting each time in a verdict in favor of defendant in error. After the first verdict a new trial was granted by the City Court. On the second trial judgment was rendered against plaintiff in error for costs. An appeal was taken to this court where the judgment was reversed per error in the trial court refusing to admit testimony establishing the

meaning of the term "flagging" or "flag" as used in sections 4 and 7, and on account of a certain error in the motion picture given on behalf of defendant in error. The complaint in this cause being filed on December 1, 1918.

In said cause being reinstated the original venue was taken to the Circuit Court of St. Clair County, Michigan, and, resulting in a verdict in favor of defendant in error. Judgment was rendered against plaintiff in error in her own action and for costs, from which judgment this appeal is prosecuted.

The principal ground urged by plaintiff for reversal of the judgment of the trial court is that the verdict is against the manifest weight of the evidence. Stating the only issue in the case was whether or not the conductor in charge of defendant in error's electric car in question flagged the crossing as contemplated by section 4 of the contract sued on. Plaintiff in error in its reply stated that "plaintiff in error's negligence is in no wise involved; the sole question is, did the conductor flag the crossing."

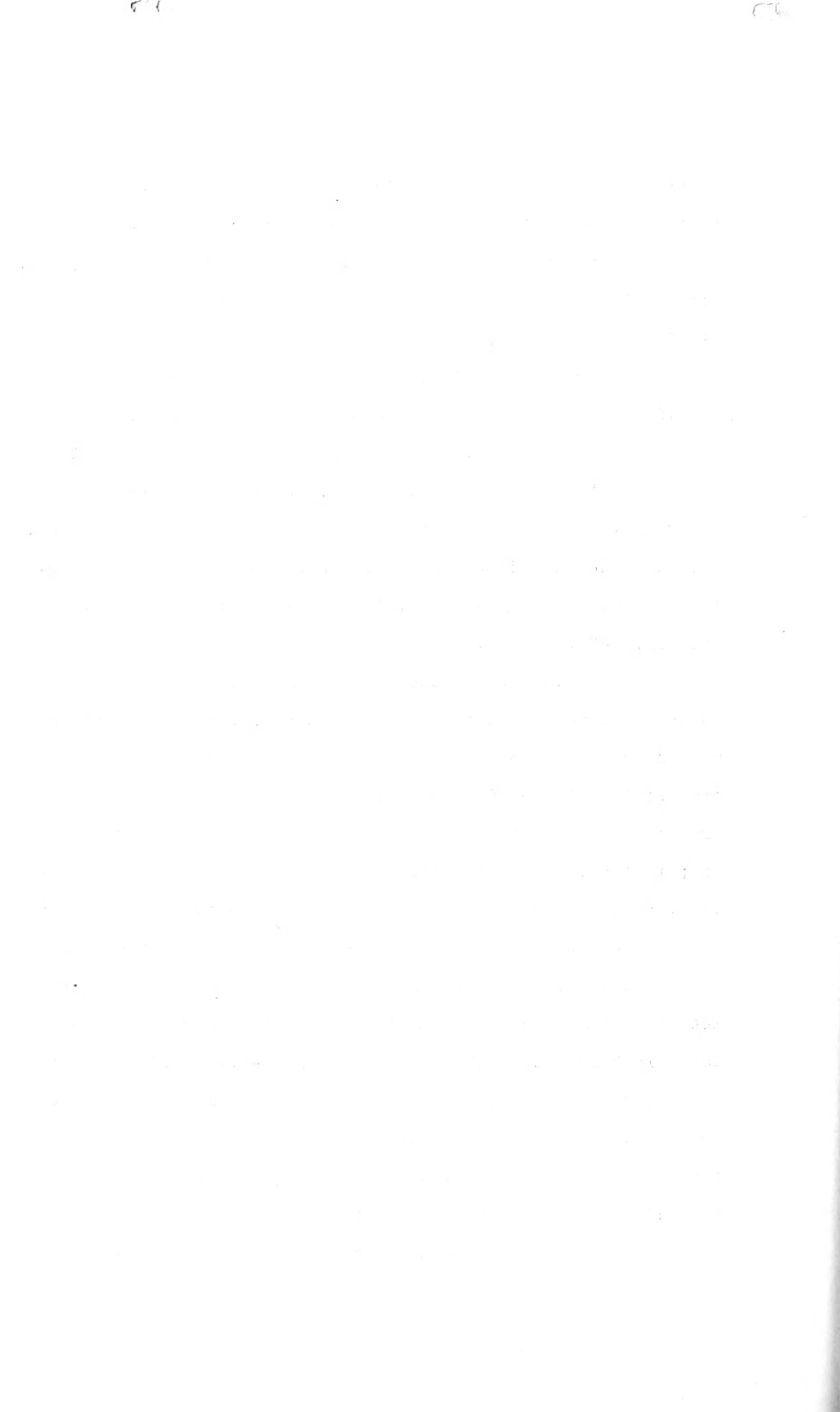
The evidence tends to show that for some reason defendant in error's electric car was stopped on the main track of plaintiff in error, and that it remained there for about one to two minutes before it was struck by plaintiff in error's train. This evidence tends to corroborate the testimony of the conductor and motorman in plaintiff in error's electric car to the effect that no train was in sight at the time defendant in error's conductor motioned for the car to cross plaintiff in error's track. Even though the train was moving at only six or eight miles per hour it would cover



several hundred feet in two minutes time, and the testimony tended to prove there was no light on the end of this freight train as it was proceeding, it is, therefore, not at all improbable that the conductor in charge of the electric car did not, at the time of the collision, see either the passenger or freight train. If any other evidence is conflicting and we are not able to say that the finding of the jury on the controverted questions of fact overrode the manifest weight of the evidence, and unless we can do so, we are not warranted in reversing the judgment on that ground. The evidence on this controverted question of fact was overwhelmingly conflicting. *Key v. Campbell*, 143 App. 3; *Hinderer v. Bradley*, 143 Ill. App. 80.

The evidence on the part of the defendant in error is to the effect that the motorman in charge of the electric car in question stopped the car before crossing the tracks; that the conductor went ahead across the tracks and then motioned the motorman to come on, which he did; that after crossing the tracks and having cleared the tracks of plaintiff in error he stopped his car again; that the conductor then went ahead on to the main track of plaintiff in error, looked up and down the track and motioned the motorman to come on, and that when the car reached the last track on the south side of the right-of-way, it would stop and was detained as shown from the evidence for one to two minutes. It was while said electric car was on this track that the freight train of plaintiff in error passed into it and injured Anna Lirerocio.

The testimony on the part of the motorman and con-



ductor in charge of said electric car is to the effect that at the time the conductor observed the defendant in error on the tracks of plaintiff in error, the defendant in error was on the electric car and it was being worked, and as the defendant in error was on the car, there was no light on the car, and the defendant in error could not be seen. On the other hand, the witness in error testified that the conductor of defendant in error's electric car, called a head of said electric car, the defendant in error's electric car in question could have been seen, and that the electric car had started across the track of plaintiff in error, certain of the servants in charge of plaintiff in error's train followed at said conductor, and in the act to cross the track, and that he gave the lead to the defendant in error in charge of said car to cross. The witness in error testified that the conductor of defendant in error both before and after the accident saw the electric car had stopped on the tracks of plaintiff in error. Several of the passengers on said electric car were killed on plaintiff in error's train that day, and the warning from anyone until the car had been cleared from the tracks being struck.

Two witnesses testified on behalf of defendant in error that the conductor in charge of said electric car started right after the accident in question to the front of the train, but thought they could not see the defendant in error, and that they could have cleared the tracks of plaintiff in error if the electric car had not been on the tracks in question. This testimony was called by defendant in error.



The record discloses that while the crossing was contemplated under section 4 of said above contract, required, according to the testimony of [redacted], an expert witness who testified on behalf of plaintiff in error, that a party to flag a crossing, "looks in both directions up and down the track to see if anything is coming and should listen. He should also that the engine or car if he goes to the crossing after he stops his car, looks in both directions and can see nothing, if there can hear nothing, then if he gives the signal to the trainmen to come across, that is all, if the crossing was in the morning of these terms." This definition was given by [redacted] and he was corroborated in this definition by several other expert witnesses.

It is next contended by plaintiff in error that the court erred in its rulings on the evidence. The [redacted] testified on behalf of defendant in error, and put objection, that the air-brake caused the car to stop when it did; that he tried to release the air-brake like four times, but was unable to do so. On re-examination plaintiff in error offered to prove that no air brake then in use would perform in the manner testified to by the [redacted]. An objection to this testimony was sustained on the ground that it tended to submit an immaterial issue. Plaintiff in error then moved to exclude all of the testimony of the [redacted] in regard to the air-brake stopping his car. The trial court refused to exclude the evidence on the ground that no objection was made to it at the time it was offered. There was no error in the ruling of the court in refusing

the evidence tendered by defendant in error in rebuttal. We think, however, the court should have weighed the testimony of the witness in regard to the wire being severed the electric wire and the jury, even though the evidence was not objected to at the time it was offered, as it did not tend to show any reversible error. We think, however, that the error was not reversible and we would not feel like reversing the verdict on this ground.

It was also objected that the court erred in refusing to direct a verdict in favor of plaintiff in error at the close of all the evidence. It was of our opinion that the evidence on the part of the defendant in error fairly tended to show that the error on the part of defendant in error's electric wire was the cause of the loss is amplified by the evidence in the record. This being true, the motion made by the plaintiff in error to direct a verdict in its favor was properly denied.

After juror in error took exception to each of the three jurors who found the issue in favor of plaintiff in error. These three jurors have stated under oath that they found the case way an appellate court will be able to disturb the verdict in the absence of judicial error. *Scott v. Hall*, 100 So. 2d 90; *Little v. Harris*, 7 So. 2d 33; *Little v. Hall*, 100 So. 2d 90, 120 So. 2d 33.

The judgment of the trial court is therefore so affirmed.

THE COURT: 100 So. 2d.

It is so reported in full.

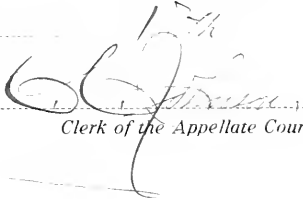
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

A. D. 1917.

15th
day of April.


Clerk of the Appellate Court.

NOINI

11

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

C. Heitmeyer,

Appellee

vs.

No. 27

October Term, 1916.

The Baltimore & Ohio Southwestern

E. & O. Co.,

Appellant

206 I.A. 224

ERROR TO:
APPEAL FROM

Circuit

COURT

Clay

COUNTY

TRIAL JUDGE

HON.

WM. F. WRIGHT



March 10, 1907

State of Illinois

Page 1

County of Clay, Illinois

Superior Court

St. Louis, Mo.

No.

St. Louis, Mo.

St. Louis, Mo.

St. Louis, Mo.

Appeal from Circuit Court of
Clay County, Illinois.

Opinion by Jones, J.

This appeal is prosecuted by appellant to reverse a judgment in favor of appellee for \$75.00 recovered in the Circuit Court of Clay County in an action on the case.

Appellee's declaration consisted of three counts. The first of which charged that appellant negligently suffered large quantities of dry grass, weeds, etc., to accumulate on its right-of-way and that fire thrown from a locomotive engine of appellant ignited the grass, etc., on the right of way, and that fire was communicated therefrom to the farm of appellee, destroying his straw, hay, meadow, etc.

The second count alleged that appellee was the owner of a stubble meadow of about 20 acres; that appellant was the owner of and operating a railroad extending along and adjoining said meadow and that sparks and flames of fire escaped from the locomotive engine of appellant, through the carelessness and negligence of appellant and set fire to said

lant's favor.

It is next contended by appellant that the court erred in giving appellee's second instruction. Said instruction is as follows: "The court instructs the jury that if you believe from the evidence under the instruction of the court, that plaintiff has sustained damages, defendant company would be liable for the damages sustained by plaintiff to which you should add his reasonable solicitor's fee."

The court erred in giving this instruction. First, for the reason that without submitting the question of the liability of appellant under the pleadings in the case to the jury, it directed the jury that if they believed from the evidence that appellee sustained damages that then the defendant would be liable for the damages. Second, said instruction directs the jury in assessing appellee's damages, to add to the same his reasonable solicitor's fees. Before appellee would be entitled to recover attorney's fees against appellant, he must prove by a preponderance of the evidence that appellant allowed dead grass, dry weeds, or other dangerous or combustible material to accumulate on its right-of-way, and that the fire complained of was set out on said right-of-way and by reason thereof, spread to the premises of appellee. Section 1 of the act in relation to fencing and operating railroads, being section 25 of chap. 114 of Hurd's A.S.

In the case at bar it was a question of fact for the jury as to whether or not the fire originated on or adjacent to appellant's right-of-way. Some of the witnesses testified to the effect that when they first observed the fire it was not on

an appellant's right-of-way. There being no effect in the evidence the court should not have erroneously instructed the jury that in vain appellant could claim to be relieved of possible attorney fees.

It is insisted by appellee that any error or omission contained in the instruction awarded appellant was cured by other instructions given by the court on behalf of appellant. This instruction directed a verdict and the error was of such a character that it could not be cured by other instructions. *Smith v. Smith*, 104 S.W.2d 111, 112, 334; *Smith v. Smith*, 104 S.W.2d 111, 112, 334.

It is next insisted by appellant that appellee is not entitled to recover in this case for the reason that he was aware of the fire which finally caused his premises to be burned and that being so aware of said fire, he failed to assist in fighting the same, and in preventing a destruction of his property, and that therefore, he cannot recover. On the other hand appellee insisted that while he did not fight said fire the reason that he did not so fight the fire was because he was physically unable so to do on account of rheumatism, and other physical disabilities. He insists, the question as to whether or not appellee was negligent in not fighting the fire was for the jury to determine and that, that question was properly submitted to the jury.

For the error in giving appellee's second instruction, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Not to be reported in full.

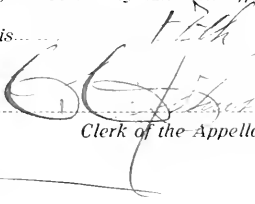
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this.....

15th day of April,

A. D. 1917.


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

2061A.234

Oby Dawson,

Appellee

ERROR TO
APPEAL FROM

vs.

No. 37

Circuit COURT

October Term, 1916.

Last St. Louis & Suburban Ry. Co.,

Madison COUNTY

Appellant

TRIAL JUDGE

HON.

GEORGE A. CROW

resulted in a verdict and judgment as above set forth.

It is insisted by appellant for a reversal of the judgment in this cause that the verdict of the jury is against the manifest weight of the evidence. The record discloses that at the place on Vandavia street in the city of Collinsville where the injury occurred, appellant had a single track laid in the center of said street. A few days previous to the injury there had been a snow fall, and the city had cleaned the gutter, sweeping the snow toward the center of the street, and appellant's track, and the street car company had swept the snow from its track toward both sides of the street. The evidence on the part of appellee tends to prove that the snow was ridged to a depth of some fourteen inches to two feet on each side of appellant's track, and that vehicles were travelling in the center of said street, it being the only place in the street that was in suitable condition for travel. The evidence on the part of appellee was further to the effect that on January 3, 1916, the day in question, he was driving a team of young mules attached to a wagon, in which were a number of friends and relatives he was conveying to his home for New Year's dinner.

The evidence further discloses that the injury occurred about 9:30 o'clock in the morning and that the weather was extremely foggy. The evidence of appellee tended to show that the fog was so dense at this time he was unable to see the street car track. Appellee testified that he was driving in a northerly direction along said street in a slow trot and that he did not see appellant's car until he was within some five or ten feet of the same;



that no gun was brandished or other signal given, and that immediately upon the car driving into view it was whirled to the right to pass the witness; that the truck hit the front wheel of the car, and the car was thrown and thrown forward to the point where the car was brought, thereby causing the injuries to the child that is brought. The evidence further discloses that nearly all of the other occupants of the wagon, and the twelve in number, were thrown to the ground.

It is Appellee's contention that by reason of the snow being piled to each side of Appellee's track, he was unable to drive his team to the right of said truck, and that the only place he could conveniently drive was in or near the center of the street, and as to this in driving, his wagon was struck by Appellee's car. Appellee was corroborated by his father-in-law and his brother-in-law who were accompanying him and by several other witnesses, some of whom were with him in the wagon at the time and some of whom were on the street car. Appellee was also corroborated by said witnesses to the effect that no gun was brandished or other signal given of the approach of the car, and that the force was so dense that it was impossible to see at a short distance. Appellee's witnesses also testified and referred to the rings of snow on each side of Appellee's track with reference to the speed at which Appellee was driving. All of Appellee's witnesses testified to the effect that he was driving in a slow trot, or as some of them expressed it, at a "little dog trot". In the other end of the evidence

offered on the part of appellant tends to prove that the gong was sounded frequently, but not continuously and that the motorman had shut off the power and, accordingly, is not to contest the time the injury occurred. The record, however, discloses that appellant's car was driven to thirty feet before it was stopped after which it was pulled back to appellee's wagon. The testimony of appellee's witnesses further tends to prove that while the car was being rigged to each side of its track that a large part of the snow had melted and that the ridge was only six inches wide and from three to five or six inches deep, so that there was nothing to hinder appellee from arriving at the right of appellant's track.

The evidence further discloses that the street was paved and that the distance from curb to curb was 24 feet 2 inches, and that appellant's track was in the center of the street. The motorman for appellant testified that appellee was driving some ten miles per hour and that he was driving faster than appellant's car was running. To this, however, corroborates the motorman with reference to the speed of appellee's team. The motorman further testified that the fog was so dense that he could only see a short distance in front of him, and that he did not see appellee's team until he got within about 20 or 25 feet of the same.

It is appellant's contention that appellee was not in the exercise of due care for his own safety and that appellant was operating its car without negligence on its part. The evidence is sharply conflicting with reference to whether there was a ridge of snow on each side of appel-

lent's truck on the cross street and the driver of the street car to drive on the cross street. Appellee was driving and the defendant's truck was bounced on other wheels when it approached the approach of its car. The evidence being conflicting, it was a question of fact for the jury as to whether or not the accident was in the exercise of due care for his own safety prior to and at the time of the injury and as to whether or not appellant was guilty of negligence in the operation of his said car at the time of the injury, and as to whether the negligence on the part of appellee, if it was negligent, was the proximate cause of appellee's injury. We are unable to say that the finding of the jury in this case is against the weight of the evidence and we would, therefore, not be justified in reversing the judgment on that account. *Winters v. City of Chicago*, 201 Ill. 511; *Chicago & N. W. Ry. Co. v. Lake Co.*, 123 Ill. App. 337; *Chicago & N. W. Ry. Co. v. McClain*, 211 Ill. 509.

It is next contended by appellant that the court erred in permitting testimony to be offered by appellee to the effect that no light was on appellee's car, for the reason that the failure to have a light on said car was not charged in the declaration. Objection was made to the testimony when offered and the trial court stated in overruling the objection, that the evidence would be given as tending to show whether or not appellee was in the exercise of due care for his own safety at the time of the injury, and an instruction was given by the court limiting the evidence to that point alone. We think we do not find the court erred



in its rulings thereon.

It is next contended by appellant that the court erred in refusing to direct a verdict for appellant on appellee's evidence and again at the close of appellee's evidence. Appellate instruction to that effect was tendered by appellant. That we have already said discloses the evidence to the character of the testimony in this case discloses that there was evidence in the record tendered by appellee fairly tending to prove his declaration. There was, therefore, no error in refusing to direct a verdict for appellant.

It is next contended by appellant that the court erred in refusing to give the 8th and 9th instructions tendered by it, and which were refused by the court. Fifteen instructions were given on behalf of appellant, and an examination of these instructions discloses that the jury were fully instructed on every legitimate phase of appellant's case, and that its theory of the case was fully presented to the jury. And an examination of these instructions will further disclose that the matters set forth in the 8th and 9th instructions so far as proper as to be included in the instructions given. The court, did not err in refusing to give the 8th and 9th instructions tendered by appellant.

A contention is made by appellant that the verdict is excessive, and that being an immaterial error in the case and the judgment of the trial court will be affirmed.

Judgment affirmed.

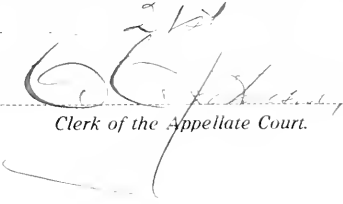
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

day of April,


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Central Funding Company,

Appellant

vs.

No. 40

October Term, 1916.

A. K. Gibson,

Appellee

206 I.A. 236

ERROR TO
APPEAL FROM

Circuit COURT

Lifflingham COUNTY

TRIAL JUDGE

HON. W. E. WRIGHT



Term 10. 40 In the Circuit Court of Appeals Affirmed. E
of Illinois, Court District.
October term, 1910.

| | | |
|--------------------------|---|-------------------------------|
| Central Trading Company, | } | |
| Appellant, | | |
| vs. | | Special Term Circuit Court of |
| J. J. Dixon, | | Illington County, Illinois. |
| Appellee. | } | |

Opinion by Lodge, J.

In an appeal from a Justice of the Peace filed
had in the Circuit Court of Illington County with a
jury resulting in a binding and judgment in favor of the
police on a claim of not over \$100 and costs. Appellee
prosecutes this appeal for a reversal of said judgment.

The record discloses that on Dec. 1, 1910, the
and the American Extension University and the American Extension
ing Co. entered into the following contract:

"I hereby order and agree to accept, receive and
paid, your complete University Extension course of study
hereinafter outlined.

It is understood that the course of study is
(a) 1. Principles of the Law, (b) 2. Principles of the Law, and
quizzers, on the negative side, (c) 3. Principles of the Law,
with special reference to the doctrine of the law of the
state I may choose - - - - - (d) 4. Principles of the Law,
and side lights - - - - - (e) 5. Subject of the law of the



work covered (c) Unlimited consultation for the full two years (d) Requirement of complete preparation in law sufficient to pass the legal examinations to practice before the bar of the state chosen. (e) Semi-annual yearly examinations, (h) diploma

In consideration of your acceptance of this application, and of \$1.00, by cash to the other herein said, the receipt of which is hereby acknowledged, I agree to pay to Central Funding Co., its successors or assigns, at Chicago, Ill., the sum of \$50., payable as follows: \$10.00 herewith and the balance at the rate of \$5.00 per month, That this contract is not subject to revocation, nor to any conditions not expressed herein in writing or print; that my failure for 30 days to fulfill its terms shall, at the option of the said Central Funding Co., its successors or assigns, cause the entire unpaid balance to become due and payable on demand..... Signed, A. F. Gibson."

The following stipulation of facts was entered into on the trial:

"Statement of facts in the above entitled cause hereby agreed to by the parties herein, that the contract and note included therein submitted herein were signed by the parties herein according to the terms set out in the agreement, that the said A. F. Gibson came to the state of Illinois as the state in which he desired to pass the legal examination to practice law; that the said A. F. Gibson paid on the said contract the sum of five dollars, and the plaintiff shipped to the said A. F. Gibson part of the stipulated

lessons with a quizzer and that the plaintiff accepted the contract or order and the defendant refused to accept the lessons and quizzers that had been shipped to him, and notified the plaintiff."

The contract alone referred to was the only evidence offered by appellant and the only evidence offered by appellee consisted of the rules governing the admission to the bar of this state as they obtained at the date of the foregoing contract.

There were no propositions of law tendered by either party, and there were no objections made to the evidence offered by either party, so the sole question to be determined on this appeal is whether the finding and judgment of the trial court was against the strict right of the evidence. *Green v. Hourigan*, 185 Ill. 331; *Woods v. Ferguson's Est.* 187 Ill. 332.

As we view the record in this case appellant wholly failed to make out a case against appellee for a breach on the note and contract offered in evidence. It was not stipulated in the contract, nor is it otherwise shown by the evidence, why appellee refused to accept the printed lessons or quizzers, neither is it stipulated, nor is it proven by evidence that appellant was ready, able and willing to give appellee the instructions provided for in the contract. For aught that appears in this record, appellee may have had, and reasons for refusing to accept the lessons and quizzers. Appellant is seeking to recover the full amount of the consideration to be paid by appellee under the contract. The law is that before appellant would



be entitled to recover on said contract it must prove by a preponderance of the evidence its ability and readiness to perform the same on its part. *Seebing's Sons' Co. v. Lock Stitch Lence Co.*, 153 Ill. 66. It would seem that after the refusal of appellee to accept the first installment of the lessons and equipment, appellant made no further offer or tender of performance on its part, nor does it show by the record that it was able, willing and ready to perform.

Where one party to a contract gives notice before the time of performance arrives that he does not intend to perform, the other party may treat such notice as a breach and bring his action, or he may decline to accept such notice as a breach, and may insist that the contract shall continue in force up to the time fixed for its final performance, holding the party refusing to perform responsible for the consequences of such refusal. *Seebing's Sons' Co. v. Lock Stitch Lence Co.* *Worce. Radish et al. v. Young et al.*, 108 Ill. 17.

Appellant would not be entitled to recover on the contract and note sued on, on the theory that it never performed its part of the contract, as it made no further effort to perform after receiving said notice and offered no evidence in proof of its ability to perform the same. This would be necessary under these authorities now cited before it would be entitled to recover.

We are, therefore, of the opinion that the court did not err in its findings and judgment, and said judgment will therefore be affirmed.

Judgment affirmed.

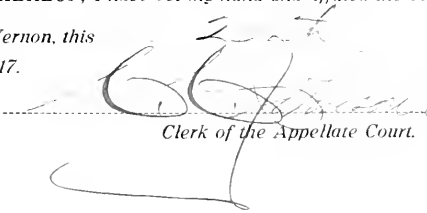
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

2nd
day of April.


Clerk of the Appellate Court.

NOINI

15

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Sarah A. Cheatham,

Appellee

vs.

No. 45

October Term, 1916.

Last St. Louis Railway Co.,

Appellant

206 I.A. 237

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. W. I. VANDEVENTER



Term 10, 45 In the Appellate Court Florida, 1916
of Illinois, Court No. 10.
October Term, 1916.

Marsh A. Chentham, Appellee)
vs.) Second Division of the Appellate Court
East St. Louis Railway) of Illinois, 1916.
Company, Appellant)

Opinion by Rogers, J.

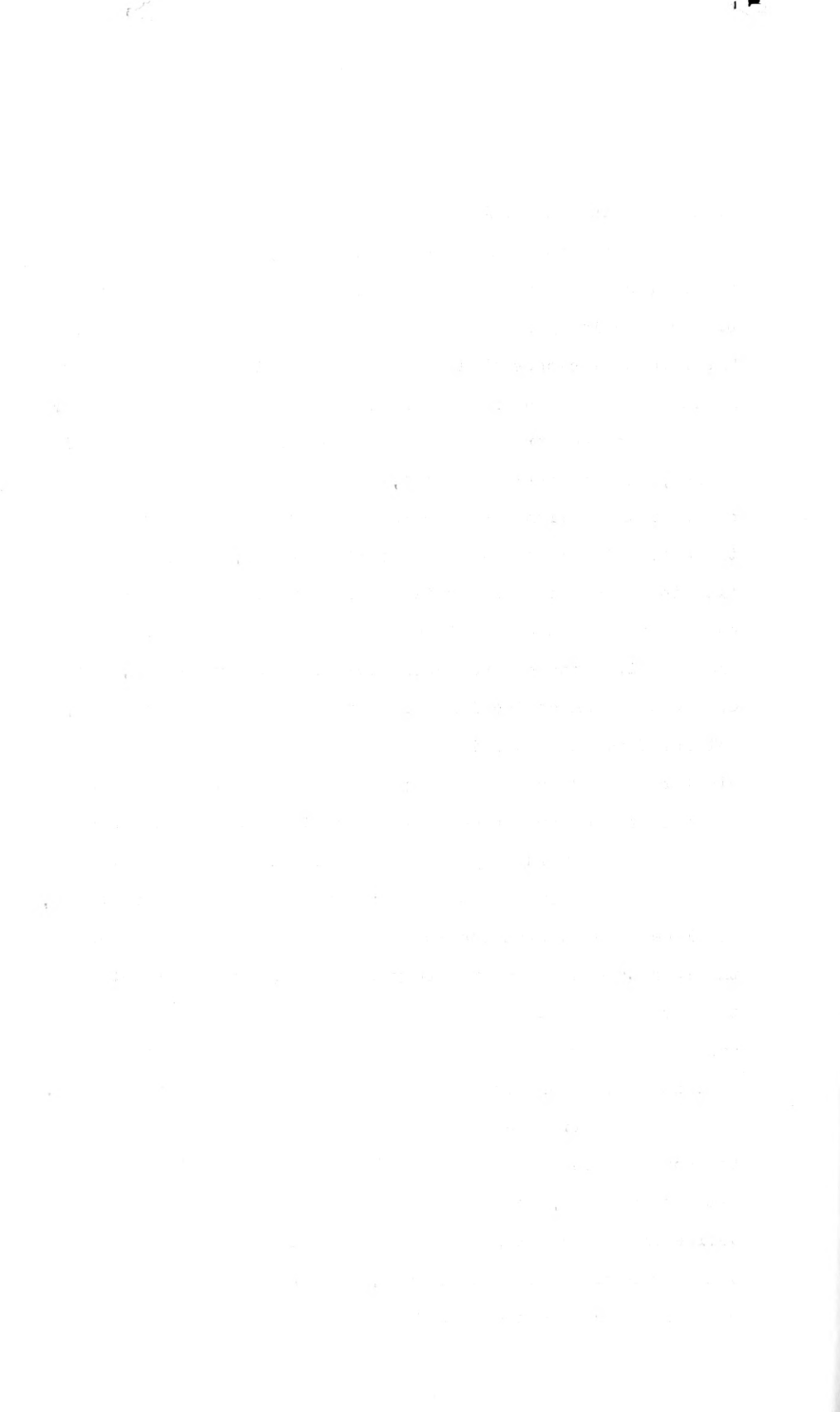
Appellee recovered a verdict and judgment for \$1500.
in an action on the case against the appellant, the Circuit
Court of St. Clair County. The declaration of appellee is of one
count, in which it was charged that appellant was operating
an electric street railroad within the city of East St. Louis,
and that while appellee was exercising due care and attention
for her own safety, was attempting to board said car, and
while she was upon the lower step thereof, appellant through
its servants in charge of said car negligently and carelessly
started said car suddenly and with a jerk, whereby appellee
was thrown from said car upon the top of the street,
thereby bruising her shoulders, arms, hips and back. It is
also alleged in said declaration that the front of appellee's
car was injured, thereby directing her fall, and that in
falling her back and spine were injured, thereby resulting in
injurying her nervous system. A writ of habeas corpus was
filed and trial was had resulting in a verdict for appellee.



ment as above set forth.

The principal ground raised in appellant's brief for reversal of the judgment in this case is that the verdict of the jury is against the weight of the evidence. The record discloses that the car in question was proceeding northward on Collierville Avenue, shortly after the noon hour and had stopped for passengers on the south side of Missouri Avenue, an intersecting street, and had then crossed said street intersection and stopped again on the north side thereof. It was at this point that appellee, while attempting to board said car received her injury. The evidence on the part of appellant tends to show that before the car had made its stop on the south side of Missouri Avenue, the conductor began collecting fares at the rear end of the car, but remained in a position where he had a view of the rear platform and steps of the car; that one or more persons boarded the car at the north side of the crossing and that the conductor not observing anyone else in sight, gave two bells as a signal for the car to start; that just as the car started, appellee came up from the rear of the car and took hold of the rear handle bar preparatory to getting on the car; that as soon as the conductor saw appellee take hold of said handle bar he gave the signal for the car to stop and that it stopped within a distance of five feet to fifteen feet.

The evidence on the part of appellee further tends to show that the car started with a slow acceleration and without any jerk, and that it was equipped with a special device which made it impossible to start the car in any other manner. On the other hand, appellee testified that she was going north on the defendant's stock car when she



ville Avenue. I got on the car at the southeast corner of Collinsville and Missouri Avenue, a regular stopping place to go to the stock yards. When I went to get on the car I had my pocketbook on my right arm and two tickets in this hand. I got aboard with my hands and landed my right foot on the bottom step of the car and went to raise the other foot to the platform. Just as I got it off the ground the car started with such a jerk that it threw my foot down to the ground, and pulled me off the car. I sprang up, broke my right hand loose. I held with my left arm as tight as I could. When I got my foot down it broke my neck and I fell on the pavement." Walter Weston, a witness in behalf of appellant testified "that he was near the corner of Collinsville and Missouri Avenue when appellee was hit; that she went to step and as she did the car started--whether or not her foot hit the step or not I couldn't tell." William Swanson, another witness on the part of appellee testified, "I remember to see her hand on the handle of the car and the car was moving slowly--when she fell--I don't know whether she was on the step or not. I know she fell. She just kind of slipped down."

While the evidence is conflicting and thus a somewhat greater number of witnesses testified in behalf of appellant than in behalf of appellee, at the same time, we are not able to say that the jury were not warranted in reaching a verdict in favor of appellee. The facts and circumstances surrounding the case, we think, tend rather to corroborate the theory of appellee's counsel and disprove her injury than the theory advanced by appellant. It is admitted by appellant's conductor that he left the car door and en-





lunch counter at one of a plaintiff's restaurants. After this injury appellee has never walked, has had to sit in a chair and has been unable to do any work except to look after the operation of said sitting.

The evidence further discloses that upon receiving her injury she was relieved and conveyed in an ambulance where she remained three days or five weeks and was then removed to her home where she has been unable to walk or do any work, except as above stated.

The evidence also indicates that prior said injury appellee had several severe ruptures of the abdominal wall. The evidence, however, is uncertain as to whether these ruptures existed prior to the injury complained of or whether said ruptures were the result of her injuries. Appellee admitted she had no rupture prior to her injury, but insists that the remaining ruptures were the result of the injury. Appellee also insists, that she received a severe injury on her head and face, and that she has suffered continuously with her right eye. Appellee's contention being that the ear fracture was due to the same or her injury. Whether or not appellee's injuries are or are not as contemplated by law, the evidence disclosed above is so relevant enough to incapacitate her from doing any kind of free walking, and that they enabled her to do so for some four weeks. The law therefore is that it is the duty of the jury in this case to be so credent as to find out whether that reason.

It is for the jury to say whether or not this character under the evidence the plaintiff injured person is entitled to recover, and unless the evidence discloses that the jury





we do not believe that appellant was seriously prejudiced by any ruling of the trial court in connection with objections made to the argument of appellee's counsel.

A motion was made by appellant at the close of appellee's evidence and again at the close of all the evidence, to direct a verdict in favor of appellant. What we have already said in connection with this motion that the verdict was against the manifest weight of the evidence sufficiently covers this assignment of error.

No complaint is made as to instructions.

-inding no reversible error in this record, the judgment of the trial court will be affirmed.

Judgment affirmed.

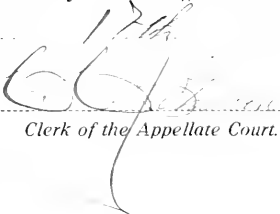
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ...
A. D. 1917.

17th.
day of April.


Clerk of the Appellate Court.

NOINI

||

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

- Hon. James C. McBride, Presiding Justice.
- Hon. Franklin H. Boggs, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 239

Charles J. Smith, Admr.

Appellee

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 51
October Term, 1916.

L. S. Smith, et al,

Appellants

Perry COUNTY

TRIAL JUDGE

HON. LOUIS DUNREUTER



Term No. 81

In the County of Cook,
of Illinois, ss. I, J. J. [illegible],
Judge of said Court, do hereby certify that

Charles E. Smith, Administrator,
vs. [illegible]

vs.

J. C. Smith, C. E. [illegible] and
J. J. Miller, Appellants

Opinion by [illegible], J.

This appeal is brought by [illegible], [illegible]
in the record as "Trustees of the [illegible] [illegible], [illegible]
ceased, to reverse a judgment rendered by the Court of Cook
of Henry County, in favor of one [illegible] [illegible]
the estate of John Smith, deceased, and [illegible]
of said Henry County, deceased. It was [illegible]
ties on the trial in the Circuit Court [illegible]
of December, 1914, executors of the estate of [illegible]
ceased were appointed by the Court of Cook, [illegible]
and that thereafter on the [illegible] [illegible], [illegible]
claim in question was filed against said [illegible]
t on one year after the [illegible] of [illegible]
torship.

It was further stated [illegible]
May Term 1918 at the time it [illegible]
tion was filed by the [illegible] [illegible]
deceased, for the [illegible] [illegible]

of said estate from the County Court to the Circuit Court and that on the 18th day of May, 1893, the Circuit Court ordered removing said executors appointed by the County Court and appointing J. M. Smith, C. C. Schenck and L. L. Hines, trustees herein, as Trustees of said estate of Henry Jones, and that said trustees thereafter filed and did a claim for said estate, and have since been in charge of said estate. The record further discloses that after the stipulation in question was made with reference to the time of the filing of said claim, the claim itself which had been lost or mislaid was found, and it appears from an examination of the claim that it was sworn to on the 15th day of January 1893, instead of the 18th day of December, 1892, and was not filed in court until the 5th day of May 1893.

The record further discloses that on the 15th day of May 1893 were filed in connection with the hearing on said claim and that the claim filed was in the usual form in which claims are filed in the Probate Court. A jury was called by the parties and a trial had by the court. After the objection to the claim in question on the ground that it had not been filed within one year after the granting of letters of executorship by the County Court of Henry County. The trial court admitted testimony on the part of the executor to the effect that the reason he had not filed the claim within one year was because he had been advised by the County Court that he would have one year for the filing of the claim after the administration of said estate had been removed to the Circuit Court and for this further reason that he had been physically ill and unable to look after his business. The

evidence, however, with reference to the fact that appellee was confined to the last and best of his ability preceding the filing of said claim. The trial court found the issues in favor of appellee and rendered judgment against said estate of Henry Lord, deceased, for the amount to be paid in due course of administration.

The principal question to be determined in this case is whether or not said claim should be allowed generally against the estate of Henry Lord, deceased, or whether judgment should have been rendered against the estate to be paid out of assets not inventoried or accounted for by the executors or trustees of said estate. In either case, the question to be determined is whether or not the claim in question was barred by reason of the fact that it was not filed within one year from the issuance of letters of administration by the County Court of Henry County.

Paragraph 7 of Sec. 7, Chapter 100, Acts of the Legislature provides among other things: "That if any claimant exhibited within one year as aforesaid from the date of the granting of letters of administration to the executor or administrator shall be forever barred unless the creditor shall file with the estate of the deceased not inventoried or accounted for by the executor or administrator, in which case the claim shall be paid pro rata out of the assets of the estate of the deceased."

Appellee concedes that to a certain extent the claim should be given effect in this case, but that on the fact that the administration of said estate of Henry Lord, deceased was transferred from the County Court to the Circuit



side of the circuit court. It is
tended by the plaintiff that the
being in a court of equity, it
it would not be governed by the
other words, that a court of equity
the at date of limit time, the
practice obtainable only in a court of
is exactly to the contrary of the
established then that equity is not
the statute of limitations. (See *Wright v. Wright*,
100 Ky. 100, 100 Ky. 100, 100 Ky. 100,
301.

The court further said that the
the party neglected to avail of
first and after his neglect, the
of limitations. *Wright v. Wright*,
100 Ky. 100, 100 Ky. 100, 100 Ky. 100,
100 Ky. 100, 100 Ky. 100, 100 Ky. 100.

In *Wright v. Wright*, 100 Ky. 100,
court says: "It is an established
law that a party in a court of equity
in this case the claim at issue is
and there was nothing to prevent
claim against the estate, and
"The court may now be said to have
least, a court of equity is not
the, ~~the~~ claim at issue is
allowed in the court of equity,
that may be said to have been



the effect of the statute, neither the...
shortly before the end of the year...
taxes were issued by the county...
typically all the...
within the time fixed by statute.

It is next contended by...
raise the question as to the...
the state of Maryland law...
known as the...
court... there...
of aid...
the... of the...
petitioner failed to...
is that in the...
necessity that the...
pleaded, the...
to...
... 44.

The question...
of the removal of the...
born... from the...
Circuit Court...
court had jurisdiction of this...
not only...
the... of this...
court had jurisdiction...
in this case...
question...
... of... by...

should have been filed in the proper court and
discovered the inventory of the estate of the decedent,
1911, 1912.

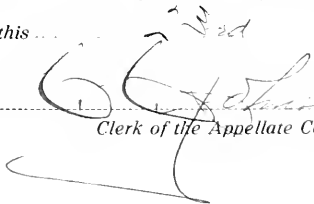
For the reasons stated above
the circuit court should have
taken the necessary steps
to modify the judgment
to make it fully comply with the
inventory estate.

It is so reported in 1911.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 16th day of April, A. D. 1917.


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 253

Otto J. Unterbrink,

Appellee

ERROR TO:
APPEAL FROM

vs.

No. 56

Circuit

COURT

October Term, 1916.

Horatio J. Bowman, Trustee, etc.,

Appellant

Judson

COUNTY

TRIAL JUDGE

HON.

J. P. GILBERT

Term No. 50. In the Appellate Court of Madison County, Illinois, 1914. 174
of the State of Illinois, County of Madison.
Circuit Court, 1914.

Otto J. Unterbrink, Appellee
vs.
City of Alton (not a defendant),
and Horatio J. Bowman, Trustee
of the Estate of Simon Hyder, an
insane person, Appellant
Circuit Court
Madison County, Illinois.

Opinion by LOLLER, J.

An action on the case was brought in the Circuit Court of Madison County by appellee against the City of Alton and appellant, Horatio J. Bowman, as trustee of the estate of Simon Hyder an insane person, to recover damages for personal injuries alleged to have been sustained by appellee when falling into a coal-hole in the sidewalk in said city.

At the close of appellee's evidence, the Court instructed the jury to find the City of Alton not guilty. The cause thereafter proceeded to trial against appellant, only. The declaration contained two counts, the first being the first count and the second or additional count. The second count so far as appellant is concerned charges that on or about and on and prior to March 1, 1914, appellant as trustee was possessed of and in control of lot 1 and lot 2 in said City of Alton, abutting on the north side of Second Street;

that on said date and for a long time prior thereto appellant suffered and admitted a disability to go and remain in the sidewalk in front of the said premises; that as was well known, or by reasonable diligence could have been known the iron cover thereon was loose and not properly fastened; that on said 12, 1934, appellant, while in the exercise of ordinary care for his own safety, stepped upon said iron cover, whereupon the same tilted and fell and he thereby sustained serious and permanent injuries.

The second or additional count of said similar allegations to said amended count, and, in substance thereto, alleges that prior to March 1, 1934, appellant, trustee, etc., had rented the lower floor and basement of the western portion of the said premises to one C. L. Langley, a tenant; that at the time said premises were so rented and occupied was in a dangerous condition and a nuisance, and had been such for a long time prior to said leasing, knowledge of which condition was known, or by reasonable diligence could have been known by appellant. A plea of the general issue and a special plea denying possession and control of the premises at the time of the accident was filed by appellant.

A trial was had resulting in a verdict and judgment in favor of appellee for \$250.00. No error said judgment this appeal is prosecuted.

The record discloses that appellant as trustee in charge and management of the premises in question, consisting of a two story building, known as the East End Hotel, and that on January 20, 1934, said premises were leased to one C. L. Langley.

acts of negligence, but as tending to show that the cause of these accidents is a dangerous condition, in which an issue is made as to the safety of the structure or work of man's construction which is a matter of fact, the manner in which it has served to support the fact that to that use, would be a matter of fact, and ordinary experience in that practical use, the effect of such use, bear directly upon such issue. It is more presents a collateral issue than any other evidence that calls for a reply which bears on the main issue. Such evidence is held competent by the weight of authority. *Sitting, Ottawa Gas Light & Coke Co., vs. Graham*, 11 Ill. 346; *City of Chicago v. Towers*, 40 Ill. 101; *City of Port Wayne v. Combs, et al*, 107 Ill. 3; *City of Topeka v. Sherwood*, 39 Kan. 490; *Dist. of Columbia v. Ames*, 107 U.S. 11; *Darling v. Caterhead*, 107 U.S. 11. ... The frequency of such accidents would create a presumption of knowledge, and would be material to the question of diligence used to obviate the cause of injury."

Counsel for defendant, however, contends that the above authorities do not apply in this case for the alleged reason that the evidence does not show that the condition of the time the premises in question were rented to defendant, was in the same condition that it was in at the time the prior accidents occurred. The evidence on this point is conflicting. The record discloses that on the night of the renting of the premises to defendant, defendant had called his agent and his attention to the fact that this coal hole was in a dangerous condition, and that it was

were stepping into the hole in the sidewalk by
thereto, appellant offered evidence that the hole
caused wire to be pulled out of the sidewalk
and that within a short time the wire was pulled
wire it was twisted up in a knot and the wire
snug against the bottom of the hole, thereby
the lid in and over the hole and the
evidence on the part of the jury, and now
that the lid in question was the one in the hole and
that it could be placed to the hole and break
between the outer rim of the lid and the edge of the
rim or flange, thereby rendering the hole un-
standing, the hole was filled.

The evidence in this case is that the jury
had stated to appellant that the hole was to
the lid to said hole and the hole was in the
defective or defective condition of the hole
the evidence being conflicting and the hole was in the
hole in question was in a hole, and the hole was in the
condition of the hole and the hole was in the
it was therefore a question for the jury and
not appellant was guilty of negligence and the
finding on that question was that the hole was in the
court unless the same is against the weight of the
evidence, and this we are unable to say. The hole was
Bros. Coal & Coke Co. Inc. v. [?]

It is next necessary to consider the court
erred in refusing to direct the jury to find
an instruction to the jury that the hole was in the
close of appellant's case and the hole was in the

that it is not possible to find a single, simple, and unambiguous

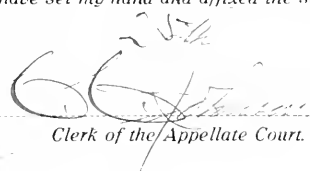
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this .

25th day of April,

A. D. 1917.


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

West Frankfort Bank & Trust Co.,

Appellee

vs.

No. 71

October Term, 1916.

Joe Baretti et al,

Appellants

206 I.A. 261

ERROR TO
APPEAL FROM

Circuit

COURT

Franklin

COUNTY

TRIAL JUDGE

HON.

CHARLES L. WILDER





fort under the firm name of Barretti and General; that they were patrons of Appelbee, bank, and had received sometime prior to the transaction in question a check for \$100.00, which is represented as an active account, which required deposits and drawing numerous checks. The record of said city of West Frankfort a firm of Barretti and General, business as Bertotti and Bolero, who carried in the bank an inactive account, consisting of the firm of Barretti and General. On November 28, 1914, one of the officers of Barretti and Bolero made a deposit in said bank, of \$100.00, and credit was given said Bertotti and Bolero of the name of Appelbee for this deposit.

The record further discloses that the officer in Appelbee's bank made an entry on said bank's general ledger giving credit to Appelbee for said amount of \$100.00. The attention of the officers of the bank was called to the fact that the firm of Bertotti and Bolero had received credit on the books of the bank for said amount of \$100.00 until about October 1, 1914, where the firm had not made a deposit had been made. In June 1, 1914, the firm had closed out their business and had discontinued their account in said bank, and checks had been cashed for their credit. The record further discloses that the amount of \$100.00 had been given as a check for the amount of the date of Nov. 1, 1914.

It is insisted by Appelbee that the \$100.00 deposit made by Bertotti and Bolero was for the firm of Appelbee, and that the bank had no right to give credit that Duncan, the bank's officer, had no right to give credit

that transaction. The receipt of appellant's check for \$511.36 was found, giving credit to the bank on the said date. On the other hand, the bank's ledger for the other of the two months involved, November 1915, showed on Nov. 28, 1915, a deposit of \$511.36. In fact, they did not get the money until the 28th. It was made up of checks for \$100.00 and \$411.36. Appellants took the money and did not cash the checks but neither of them could undertake to state that they individually had cashed the deposit, and appellant stated that a deposit of travel money was made to him, either by checks or in cash. They were, however, concerned in connection with the transaction tending to corroborate the testimony of appellant rather than to deny it, being on the ledger of the bank giving credit to the bank for said amount and the entry in appellant's checkbook.

While the evidence in this case is conflicting, it is for judgment the preponderance of the evidence supports the verdict of the jury. Beyond any controversy, appellant in the case clearly disclosed that the money was made by Bertoni and others on Nov. 28, 1915, and that the parties received no credit therefor on the bank's ledger. The evidence also clearly disclosed that the only one deposit of \$511.36 made on credit was made by appellant further in that if there had been a deposit of said amount made on November 2, 1915, and the entry had been entered on the books of the bank, the bank's books would not have balanced, and the error would have been once discovered. It requires no reason for this verdict, as in our judgment it is fully supported by the evidence.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

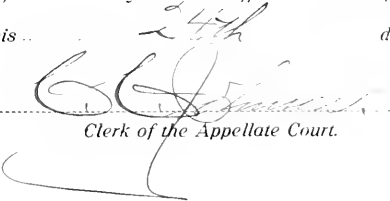
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ..

24th

day of April,

A. D. 1917.


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an *OPINION* in the words and figures following:

M. E. Thorne,

Appellee

vs.

No. 74

October Term, 1916.

Southern Illinois Railway &

Power Co.,

Appellant

206 1A. 262

ERROR TO
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON.

A. W. LEWIS



for No. 71.

1. J. J. Byrne,

vs.

William J. J. J.

Defendant

Defendant

Union, N. Y., N. Y.

Appellee Institute, Inc. in the County of
Line County to recover damages for the
trial was had in the justice court
in favor of appellee. Appellant brought
Circuit Court of said County where
resulting in a verdict and judgment in
75. C. Appellant prosecutes this

The evidence disclosed is that
electric interurban along the street in
rier Hill, adjacent to appellee's
land tied the cow in question in
such a position that the cow
is to the adjacent street and
right-of-way. The premises of appellee
higher than the grade of the street,
rest of the lot at the rear of the
and appellee's lot. The evidence



and the north rail of said track. On the morning of the injury, the car was moving or lying between said north rail and said track. One of the plaintiff's men on said car saw the car approaching and the power of said car and applied the brakes. The brake was applied and the car continued to move until within some six or eight feet of the track, where it backed up to the track, was struck by the car, and was broken. The foreman immediately applied the brakes, stopped the car within about fifty feet from the place the car was struck. The injury was of such a nature as to necessitate the killing of the cow.

It is first urged by one of the parties that on said judgment that the court erred in giving the following instruction tendered by the plaintiff: "I instruct the jury that even though you have heard some evidence that the plaintiff permitted the car to be tied in the front yard with a rope, it is not to be held that the cow could go into or near the yard, and that this, in law, would not amount to negligence, and hence that would prevent a recovery on the part of you further believe from the evidence that the plaintiff is otherwise negligent." The plaintiff is otherwise negligent. The jury take into consideration all the evidence shown in evidence in this case.

This instruction, as stated, is not correct, and the reason it takes from the jury the right to find that the plaintiff is negligent.



negligence on the part of the defendant in tying her to the
a way as to enable the defendant to avoid liability for the
upon the track of the defendant's negligence, a distance of
feet to the defendant's negligence. 111.317. 111.317. 111.317.
111.317. 111.317. 111.317. 111.317. 111.317. 111.317.

In the case of 111.317. 111.317. 111.317. 111.317. 111.317.
supra, at page 117. 111.317. 111.317. 111.317. 111.317. 111.317.
appellee was guilty of contributory negligence, was an
important question of fact for the jury, to be determined
from all the circumstances in the case, and by the trier
of fact, under proper instructions.

It is not the only instruction given on behalf of
appellee and we think the objection to the instruction is
of so serious a character in connection with the facts in
this case that it requires reversal on this point on this
account.

Appellant also insists that the court erred in re-
fusing to give certain instructions tendered by appellant
and which were refused by the court. There were several
these instructions. Without going into these instructions
in detail, it is only necessary for us to say that we are of
the opinion that the first, fifth and sixth instructions are
correct principles of law and that appellee is entitled to them
in this case and should have been given.

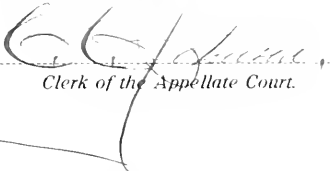
While certain of the other instructions which were
refused by the court were correct principles of law, we do
not think that they were entitled to be given in this case
and there was no error in refusing to give them. The
urged by the appellant that the verdict is not supported



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this..... 20th day of April.
A. D. 1917.


Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Harry Haynes,

Appellee

vs.

No. 78.

October Term, 1916.

Saline County Coal Co.,

Appellant

2061.A.264

ERROR TO
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON,

A. W. LEWIS

Term No. 70. In the Spring of 1911, at
on 11111111, at 11111111
11111111, 11111111.

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An action on the 11111111 of 11111111
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In our judgment, the notice filed with the Board sufficiently identified the act by its title, and said notice was sufficient, even though it contained an erroneous recital as to the date the act was enacted. *V. L. Conle, 186 Ill. 340; 186 Ill. 340, 186 Ill. 340.*

It is further contended by appellant that said notice was not sufficient proof of the posting of the notice in accordance with the provisions of the statute. There is evidence in the record tending to show that said notice was properly posted. However, we think under the holding of this court in the case of *Bateman v. Carterville*, 186 Ill. 340, 186 Ill. 340, 186 Ill. 340, that where the allegation in the declaration that the employer has elected not to pay compensation under the Workmen's Compensation Act is not denied by a special plea, proof as to the execution, filing and posting of the same is thereby waived. We hold, therefore, that the pleadings in this case establish that appellant is entitled to pay compensation under the Workmen's Compensation Act.

It is next insisted by appellant that no liability can be had by appellee for the reasons that under the Coal and Miners Act as amended in 1905, it was not the duty of the mine examiner to examine for toxic conditions, such as are particularly set forth in Chapter 93 of the Revised Statutes of 1905. Section 4 in reference to the duties of the mine examiner follows: "To inspect all places situated within the State to determine the performance of their duties as to the safety of the mine to serve whether there are any recent falls of rock or accumulations of gas or dangerous conditions in the mine."





It is argued by the defendant that the fire was not visible in room 201, at the time of the fire, and that the defendant should have known of the condition of the coal falling from the roof of the coal. The plaintiff, however, argues that the defendant was sufficient in number to see the fire, and that it extended into the room, and that it fell upon the coal, and that the defendant should have given notice to the plaintiff.

It might be argued that the plaintiff, in deciding to enter the room, should have known of the condition of the coal, and that the injury and loss of the plaintiff were not in the exercise of the plaintiff's duty. However, the plaintiff's action under the contract is not barred by the defense of contributory negligence, and the only question is whether the plaintiff's action was barred by the defense of contributory negligence or in part resulting in the plaintiff's injury.

It is implied by the plaintiff that the plaintiff applied knowledge of the condition of the coal, and that the plaintiff was in a position to see the fire, and that the plaintiff should have known of the condition of the coal. The plaintiff, however, argues that the plaintiff was not in a position to see the fire, and that the plaintiff should have known of the condition of the coal.



to have warned appellants of the error. See *People v. [redacted]*, 111 Cal. 2d 101, 102, 34 Cal. Rptr. 2d 101, 102, 200 P.2d 101, 102. We see no serious objection to this ruling. The court did not err in refusing to grant the motion.

It is not insisted that the court erred in refusing the seventh instruction. The court examined this instruction and found it to be correct in its refusal for the reason that the instruction of the jury to participate in the crime was not instructed them that they should give credit to the state in making up their verdict. This error in instruction has been frequently condemned.

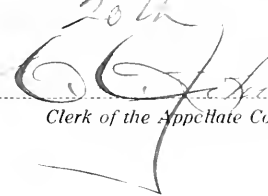
Nothing is reported to show that the decision of the trial court will be affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this .. 20th .. day of April, A. D. 1917.


.....
Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Urie J. Hamilton,

Appellee

vs.

No. 81

October Term, 1916.

C.C.C. & ST.L.Ry.Co.,

Appellant

206 I.A. 270

ERROR TO
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON.

A. J. LEWIS

Term No. 61 In the 1st 1st 1st 1st 1st
of 1st 1st 1st 1st 1st
October 1st 1st 1st 1st 1st

1710

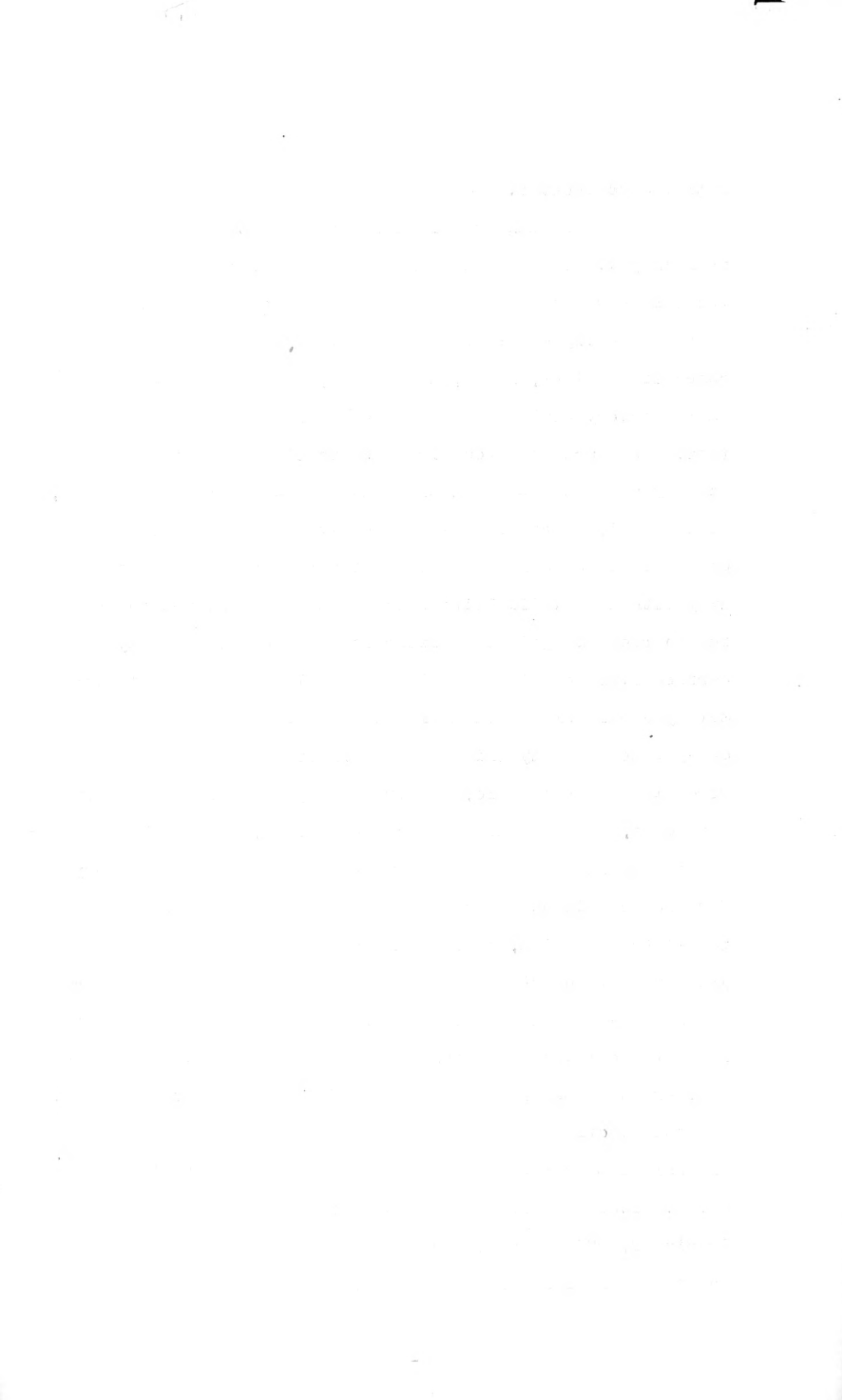
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entitled to recover.

The leading case is *Looney v. Chicago & North Western Ry. Co.*, 100 U.S. 390, 391, 10 L. Ed. 221, 222. Recovery was sought for sheep from a carrier from the negligent transport of sheep from Boise, Idaho, to Chicago, Illinois. The recovery could only be obtained from the carrier. The court in discussing the liability of a carrier under the *Harburn Bill* and the *Interstate Commerce Act*, at page 341, says: "It is frequently said by the courts that the purpose of the *Harburn Bill* was to get away with the difficulties which attend the recovery of property carried over more than one line of railroads. The question met by a shipper in attempting to locate his liability for damages to property shipped over different lines of railroads were almost insuperable, and accordingly the *Harburn Bill*, in this case, was not only over several lines, but over several lines and in several different states. The *Harburn Bill* for such condition Congress gave the shipper the right to institute an action, against the carrier receiving the property for an inter-state shipment, to recover damages occurring anywhere in the course of the transportation, by giving it to the carrier receiving the property at the point of destination. The carrier on whose line or lines the damage occurred was liable. The construction of this act with regard to the liability of the United States Supreme Court in *Chicago & North Western Ry. Co. v. Riverside Mill, etc., Co.*, 100 U.S. 390, 391, 10 L. Ed. 221, 222, and *Chicago & North Western Ry. Co. v. Granger*, 100 U.S. 390, 391, 10 L. Ed. 221, 222, and *Chicago & North Western Ry. Co. v. Granger*, 100 U.S. 390, 391, 10 L. Ed. 221, 222, as to the liability for damage to property carried over more than one line of railroads." *Chicago & North Western Ry. Co. v. Granger*, 100 U.S. 390, 391, 10 L. Ed. 221, 222.





of said shipments it did not comply with the provisions of the contract of shipment with respect to the giving of notice of claim for damage, but he is of the opinion that the giving of said notice was timely. He also thinks that the record does not establish that the appellee failed to make the necessary steps to give notice of claim.

It is also pointed out by appellant that the error occurred in giving the four instructions given to the jury. He has examined these instructions and as to instruction No. 1, he sees no substantial objection, and there was no error in giving the same. Instruction No. 2 is erroneous for the reason that it does not limit the right of recovery on the interstate shipments to the loss of said shipments as were received by appellant as a limited carrier, and under the subscription of the bill of lading was a carrier. Instruction No. 3 is erroneous in that it is indefinite in character and would in our judgment tend to confuse the jury and should not have been given. Instruction No. 4 is erroneous for the reason that it allows recovery against appellant claiming goods lost or damaged by him in its possession without reference to whether or not the interstate shipments or not. If an interstate shipment, appellant, to be liable must have been the limited carrier.

For the reasons above stated the judgment should be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported in 1911.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this . . .

A. D. 1917.

20th
C. C. Johnson,
Clerk of the Appellate Court.

OPINION

Per §

.....

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

John Meier,

Appellee

vs.

No. 88

October Term, 1916.

C.C.C. & St. I. Ry. Co.,

Appellant

200 L.A. 285

ERROR TO
APPEAL FROM

Circuit

COURT

Madison

COUNTY

TRIAL JUDGE

HON.

J. F. GILHEAL



were switched across and "run against the traffic" about ten days prior to the accident in question, appellee was hired by appellant's supervisor to act as a flagman at the running over the track under repair. It was the duty of appellee to go down to Cape Tower, get orders from the operator in the tower and then go east along the track, set torpedoes and flag west bound trains, to advise in a flag order over the track being re-ballasted. On the morning of the injury it was misting and windy. Appellee left his house just west of the public road and started to go to the tower to get his flagging orders, and in doing so, he testified that he went straight across the tracks toward the south side where there was a path along the south track commonly used by workmen in going to the tower. Appellee also testified that as he crossed the track he looked east and saw the train in question some two miles distant coming on the tracks. The evidence further is that appellee turned his back on the train and started to walk west toward the tower, walking on the south edge of the ties of the south track. He did not look back to see which track the train was on, but continued to walk toward the tower. When appellee had walked for some 300 feet he was struck by the front of the engine and severely injured. At the time of the injury in question the train was running west at about thirty or forty-five miles per hour on the south or "against the traffic" track at a station east of the place where the injury occurred. Appellee testified that he did not hear the whistle or any other ringing. The road supervisor and a son of the appellee were at the tower at the time of the injury and testified that

not hear the engine whistle until it was nearly opposite the tower. On the other hand, the engineer testifies that he gave the usual whistles when he was about one-half mile from the highway and some ten short warning blasts of the whistle between that point and the place where the accident occurred, and that the bell was ringing all the time through an automatic ringer. He further testified that he shut off steam and applied the brakes as soon as he perceived the car in danger of being struck. In this he was corroborated by the fireman and brakeman who testified positively to the blowing of the whistle and ringing of the bell.

The declaration consists of two counts, the first count being the usual common law negligence count. The second count alleges that appellant was engaged in interstate commerce and that appellee was employed by appellant in such commerce. Both counts of the declaration declare common law negligence in appellant running a train on the south track at a high rate of speed without giving any warning by sounding the whistle. Neither count declares the violation of any statute enacted for the safety of employees. As to the first count, the appellant pleaded the general issue and also a plea denying that appellee was employed by appellant at the time of the accident. As to the second count appellant pleaded merely the general issue.

At the close of appellee's evidence the court instructed at the close of all the evidence, in substance, that the jury should find for appellee unless they were satisfied by appellant directing a verdict in his favor. The only instructions were by the court that the jury should find for appellant if they believed that the accident was caused by the negligence of appellee. It is strenuously

counsel for appellant that appellee, having knowledge of the oncoming train, which afterwards struck him, was guilty of contributory negligence in walking down the track on the end of the tier without looking around to ascertain the whereabouts of the oncoming train.

In our view of the case it is immaterial as to whether or not appellee was guilty of contributory negligence, for if entitled to recover at all, his recovery must be under the second count of his declaration. If we are correct in this conclusion, then even though appellee were guilty of contributory negligence it would only be material as affecting the amount of damages he would be entitled to recover, if entitled to recover at all. Under the decisions of our Supreme Court and the decisions of the Supreme Court of the United States, it is conclusively held that where Congress has entered the field and taken possession of a subject over which it is given control by the Federal Constitution, its possession and control is exclusive. *Staley v. U. S. Co.* 268 Ill. 356; *Devine v. U. S. Ry. Co.* 223 Ill. 1; *St. Louis, San Francisco & Texas R. Co. v. Heale*, 229 U.S. 156.

In *Staley v. U. S. Co.*, supra, at page 377 the Court says: "The Federal Employers' liability act has taken possession of--has occupied--that field for the purpose of calling into play therein this exclusive power of the Federal government. Accordingly, all common or statute law of this State on that subject has been superseded. The field of liability as to employer injured while engaged in interstate commerce on railroads is occupied exclusively by the

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Federal Employers' Liability Act,--and that, in regard-
less of the negligence or lack of negligence of either party
to the litigation. Beyond question the Federal Employers'
Liability Act superseded, as to injuries of employees en-
gaged on railroads in inter- state commerce, the common
law in force in the State of Illinois, so as to the
passage of the Workmen's Compensation Act.....the
decendent having been engaged, at the time of his death, in
inter- state commerce, the recovery must be had, if at all,
under and subject to the provisions of the Federal Employers'
Liability Act."

Section 3 of the Federal Employers' Liability Act
provides as follows: "That in all actions brought or brought
against any such common carrier by railroad under or by vir-
tue of any of the provisions of this act to recover damages
for personal injuries to an employee, or where such injuries
have resulted in his death, the fact that the employee may
have been guilty of contributory negligence shall not bar a
recovery, but the damages shall be diminished by the jury in
proportion to the amount of negligence attributable to such
employee; provided, that no such employee who may be injured
or killed shall be held to have been guilty of contributory
negligence in any case where the violation of any statute
enacted for the safety of employees
contributed to the injury or death of such employee."

In order, therefore, to recover in an action for
damages for personal injuries under said act by an employee,
it is only necessary to prove that the injury was caused in
whole or in part of negligence on the part of the employer.
Federal Employers' Liability Act, Sec. 1; 45 U.S.C. Sec.



supra. Said Sec. 1 provides among other things: "If any very common carrier by railroad while engaged in commerce between any of the States.....shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parent, and if none, then of the next of kin dependent upon such employee, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier."

On the trial of this case appellee submitted prima facie evidence that appellant was engaged in interstate commerce, and that he, appellee, was injured while employed by the appellant in such interstate commerce. The evidence, whatever was offered by appellant to contradict the evidence offered by appellee, and in its brief and argument appellant does not raise any question as to its being engaged in interstate commerce, or as to appellee being employed therein. Assuming that appellant was engaged in interstate commerce, and that appellee at the time of the injury in question was engaged in such commerce, the rights and liabilities of the parties are to be governed exclusively by the Federal law, and the recovery, if sustained, must therefore be tried under the second count of the declaration.

It is next urged by appellant that the greatest weight of the evidence shows conclusively that appellant was not guilty of negligence which in whole or in part caused the injury in question to appellee. The only negligence charged



against appellant in the second count of appellee's declaration on which appellee can recover is the failure of the engineer to give timely warning of the approach of the train. As heretofore stated appellee said his two witnesses testified that they did not hear the whistle blown or the bell rung prior to the injury to appellee, and on the other hand, the engineer, fireman and brakeman of a railroad testified affirmatively that the whistle was sounded some 100 feet east of the high-way and at a point, at least 875 feet east of appellee, and that repeated warning blasts were sounded. Said witnesses on behalf of appellant also testified that the engine had an automatic ringer and that the bell was ringing and did not stop ringing until the train had stopped and it had been shut off by the engineer. The credibility of the witnesses and the weight to be given to their testimony was for the jury and unless we can say that the verdict of the jury is against the manifest weight of the evidence we are not warranted in reversing the judgment on that ground.

Two jurors have tried this case and each of them have found the issue in favor of appellee, and that appellant was guilty of negligence as charged. In view of this fact and in view of the fact that the evidence is conflicting with reference to whether or not warning was given by the engineer by blowing the whistle and ringing the bell, we do not feel that we would be justified in reversing and remanding this cause on that ground alone.

Here two jurors have found the issue in the same way on conflicting evidence, the trial court of this court should be slow to set aside the verdict of the jury. *Ingers v. S. & C. R. R. Co.*, 111 Ill. 201.



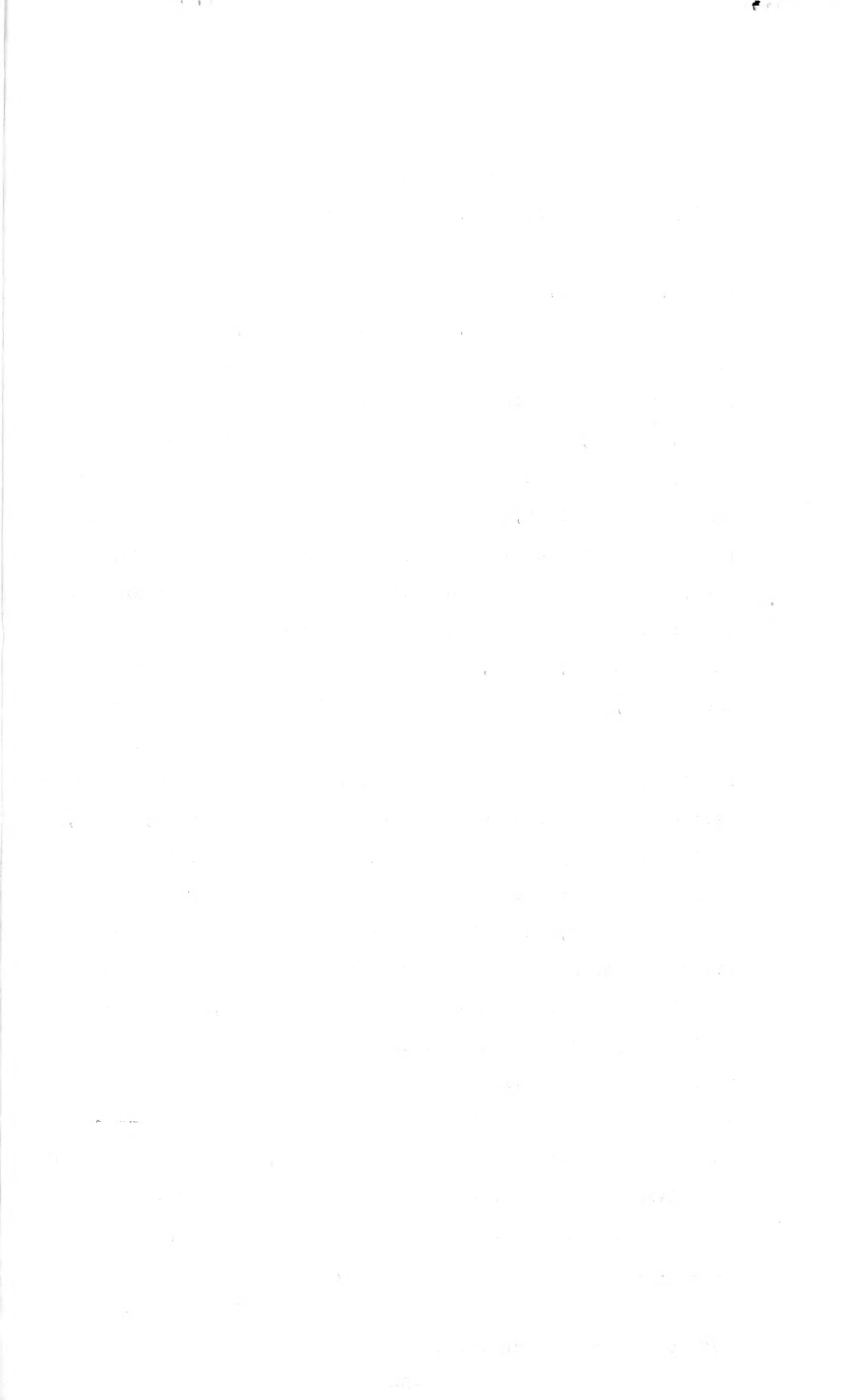
In order to sustain the action under the Federal Employers' Liability Act, it was necessary for appellee to prove he was employed by appellant. The evidence in the record, we think, sufficiently establishes the employment of appellee by appellant, concerning appellee, appellee testified that Charles Iwald, superintendent or vice-superintendent hired him and that he got his orders or directions from Iwald. Iwald, who at the time of the trial was still in the employ of appellant, testified to the employment of appellee on behalf of appellant, the Big Four Railroad. This evidence was not contradicted in any way by appellant. A complaint, however, was made by appellant with reference to two rulings of the trial court in not permitting it to cross-examine appellee and the witness, Iwald, on said point. An examination of the record, however, discloses that the complaint is not well taken for while the court at first limited the cross-examination of appellant in reference thereto, it subsequently allowed the question put by appellant to the witness, Iwald, as to the employment of appellee, to be answered, the answer being, as above stated.

Lastly, it is urged by appellant that the court erred in giving the second instruction given on behalf of appellee. This instruction is based on Sec. 1, of the Federal Employers' Liability Act, and is a copy of the law, and while the whole action is not set out, still we are unable to see how the giving of this instruction could have ~~been~~ in any wise prejudiced the case of appellant, and we do not think the giving of the same constituted reversible error.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.



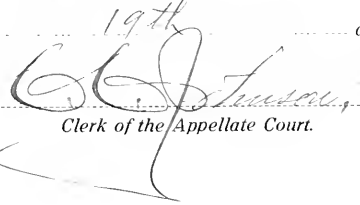
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 19th day of April,
A. D. 1917.


Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

William Kaster, Jr.,

Appellant

vs.

No. 17

October Term, 1916.

John Brinkman,

Appellee

206 I.A. 307

ERROR TO:
APPEAL FROM

Circuit

COURT

Washington

COUNTY

TRIAL JUDGE

HON.

J. F. GILHAM

Term No. 17.

1900.

October 17, 1900.

William L. Lorton, Jr.,
Appellant
vs.
John L. Lorton,
Appellee.

Appeal from the Circuit Court of the District of Columbia.

Opinion of the Court.

--- 3 ---

Appellant, William L. Lorton, Jr., is the owner of eighty acres of land in Washington county, Virginia, lying the long way east and west. About one-half of the west forty acres is a forty acre tract of land owned by a trustee of the latter is another forty acre tract, owned by William L. Lorton, Jr., the father of appellant. The other forty acres of land is owned by appellee. The land, except about one acre located in the south east corner, which is high and a part of a hill slope. The two tracts of land belonging to appellant is high land located on the east or the shore thereof, except about six acres on the north end of the west forty acres, which is bottom land and lies back to appellee's tract which joins it on the north. The east or the shore area of appellee's west forty acres is high, the six acres in the bottom, lies back to the shore and the main tract lies back on a slope a usually called the forty acres owned by appellee. About twenty acres of the latter tract

forty acres, four or five acres of the forty acres belonging to his father and the son have been digging a ditch in the south east corner of his forty, and running it to the north east. The plot introduced in evidence is a ditch or drain starting near the southeast corner of appellant's forty, and running in a north easterly direction to the southeast corner of appellee's forty, for which it is said to be located, thence north along the road for 75 yards, and then across the road onto appellee's land. This ditch where it entered appellee's land is shown by the proofs to have been about four feet deep and six feet wide, and some of the water from it flowed out further on over appellee's land. Now four or five years ago, appellant, in order to more rapidly cultivate his land, dug a ditch on his own premises between his forty corner and the east forty acre of appellee. This ditch commenced near the high ground in the southeast corner of appellee's land and ran parallel with appellee's south line, and the earth taken from it was thrown to the north of the ditch forming an embankment on that side. The ditch and embankment so constructed, obstructed and changed the channel of the natural flow of the water from appellant's west forty, and instead of going across appellee's land, it was carried west in the ditch to a point near the south east corner, where it emptied into another ditch, which appellee had laid on his land, to carry the water from that point to the north. In the spring of 1911, an elder made another ditch, extending from the east end of the ditch already existing on the south line of his forty, easterly to the east of the mill

and onto the land of appellee, flowing in a
that overflows from the creek at its mouth, and
causes the water to flow over the land of appellee, with
abundant and rapid flow, in winter.

It was a matter of common knowledge that the
ditch and channel had been constructed by appellant
aforesaid, caused water to flow over the land of appellee
and injure his crops and land in winter, and caused
by appellee, it was large enough to carry off all the
water that came off of appellee's land, and that water
was not caused to remain or stored on the land any longer
than it did before the ditch was dug. Appellee testified
that the ditch was a benefit to appellee's land rather
than an injury for the reason, explained by him, that the
water was admitted to flow off and quickly to a stream.
The trial resulted in a verdict of the jury in favor of ap-
pellee and a judgment against appellant for the costs of
suit. Appellant has brought the record here for review,
contending, among other things, that the trial court erred in
refusing to give his instruction A, B and C, and in giving in-
structions W, X and Y in the case of appellee.

Appellant's revised instruction A, B and C, state that
the owner of higher land is entitled in cases of adverse
floods to have the overflow of the surface water follow
the natural water course without artificial obstruction,
and goes on to state a correct principle of law, and there
was no error in refusing it as it did not contain a
pronunciation of law, without calling *it* to the court. The
criticism of appellant's third given instruction, is that it

that he restored it to its natural state and that he did not cast upon the land of the defendant, William Heston, Sr., water which did not in the course of nature flow thereon, then you should find the verdict in favor of the defendant."

"6. The court instructs the jury that the defendant has a right to dig ditches and convey water in any course he desires, so long as the ditch is wholly upon his own land, provided that by doing so he does not cast upon the land of an adjoining property owner water that would not in the course of nature flow thereon".

These instructions stated in substance correctly, the law applicable to the owner of the dominant estate, but were misleading and not applicable to the issues in this case, for the reason that the proof showed that sometime prior to the instructions were given, was the owner of the servient estate. The rights of the servient owner are totally different from those of the owner of the dominant estate and different rules must be invoked concerning them. In *Willard v. Madison Coll. Co.*, 49 Ill.484, the following language is used, "In *Laufman v. Criesemer* 20 Ill. the doctrine was recognized that the superior owner is not liable for injury by throwing increased waters upon his neighbor, through the natural and customary channels, and in *Martin v. Middle*, 415, it was held, where two fields adjoining one another and one is lower than the other, the lower must necessarily receive at least all the natural flow of water from the upper and the owner of the lower ground, is not entitled to strict liability."

whereby the natural flow of the water from the upper ground shall be stopped."

And later in the same opinion, our court quoted approvingly from *Martin v. Middle*, where, the plaintiff: "is owner of the upper field, the water is abundant. It is a duty, to have the water that falls upon his land, and flow on the same upon the field below, which is charged with a corresponding servitude in the nature of dominant and servient tenements". To the same effect is *Turner v. The W. Convery* 208 Ill. 511.

The three instructions above referred to contained material error as applied to the pleadings and facts in this case and for this reason, together with the error contained in instruction No. 3 given for appellee, the judgment of the trial court will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

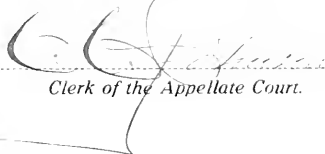
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

25th

day of April.


Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

S. L. James,

Appellee

vs.

No. 20

October Term, 1916.

Illinois Central Railroad Co.,

Appellant

206 I.A. 309

ERROR TO
APPEAL FROM

Circuit

COURT

Effingham

COUNTY

TRIAL JUDGE

HON.

WM. E. WRIGHT



October 1911, 1911.

Plaintiff
 v.
 Defendant
 Illinois Central Rail-
 road Company,
 Defendant

Decision by the Court.

---ONE---

This is an action to recover damages of a horse
 belonging to appellee, J. L. Barker, which was struck and
 killed by a freight train of appellant, Illinois Central
 Railroad Company, on November 17, 1911. The horse escaped
 from appellee's barn and came on to cross the track at a
 point within the corporate limits of the village of Mather-
 ick, where appellant was under no duty to "look for signs of
 way. The accident occurred about one o'clock P. M. Appen-
 tant operates a railroad through Matherick in an easterly
 and westerly direction. Commencing at a point a short
 distance west of the depot the track as it enters the railroad
 curves to the north, but it reaches a point about 75 feet
 east of the depot and about 100 feet north of the depot, from
 which point on east it is straight. It then crosses a culvert
 from a point west of the depot to the east, and from the
 culvert east is on a grade. The accident occurred when a
 freight train of 26 loaded cars going east and at the time

of the accident was traveling at the rate of about 15 miles per hour. The horse came upon the track from the north on the left-hand side of the engine, and, as it was shown, at a point about 25 feet west of the caboose, the man in front of the engine to a point about 150 feet west of the caboose, where it was struck by the engine and killed. The case was started before a justice of the peace and on appeal was tried before a jury in the circuit court of Birmingham county, where a verdict was returned in favor of the appellee for \$100. A motion for a new trial was overruled, a judgment entered on the verdict and an appeal taken to this court by the railroad company. Considering and upon the trial court's refusal to give its peremptory instruction, the giving and refusing of other instructions, the error of verdict submitted to the jury by the court, and the overruling of the motion for a new trial.

Upon the trial, the court gave an instruction which told the jury, "if from all the evidence and all the circumstances shown in evidence, you believe, by the preponderance thereof that by the exercise of reasonable care and caution the horse could have been seen by the employee in the defendant in charge of said train as said horse was on the track of defendant's railroad in time to have stopped said train or to have reduced its speed so as not to have killed said horse by the exercise of reasonable diligence, then it was the duty of said employer to have done so." Three other instructions given for the appellee indeed upon the railroad the duty to exercise reasonable care and caution to discover the presence of the horse on the track. These in-

instructions were erroneous. . . . any
over to an animal increasing in size. . . . claim
from wantonly or negligently trapping, . . .
care and diligence to avoid injury. . . .
could be to the animal. . . .
an animal, unless only a small number of . . .
to eliminate the cause of the . . .
use of the track and it is established . . . in de-
taining upon the prescription, stated that . . .
its attention, that its right in that . . . not be
interfered with. . . . 106 v. 106, 73 . . . ; . . .
106 v. 106, 142 id. 106; 106 v. 106, 106 id.;
106 v. 106, 106 v. 106, 106 v. 106, 106 v. 106
element is not in position to establish . . .
the reason that the same animal . . .
several instructions given in its . . .
claim of an error in instruction . . .
found in the instruction afforded . . .
106 v. 106, 106 v. 106, 106 v. 106, 106 v. 106,
106 v. 106.

The court primarily considered the . . .
form of verdict, but, if correct, . . .
tends to focus on verdict . . .
finding for the plaintiff, . . .
file the defendant . . .
inadvertently omitted . . .
for such a . . .
could not have been . . .
reversible error.

There was much evidence introduced as to whether the curve in the track just west of where the horse was struck was such as to prevent a fireman's position and position from seeing the horse in time to have avoided the accident by the exercise of reasonable care and diligence. The engineer testified he was in his seat looking ahead while passing through Hitterich; that on a part of the track curving towards the fireman's side he did not see, and could not have seen the horse even a short distance ahead of the engine; that upon hearing a warning cry from the fireman he shut off the steam and partially applied the air brake and asked the fireman what was the matter, but at that time the horse had been hit. The fireman testified that as they passed through Hitterich he was firing the engine in order to make the grade east of the trestle; that when he climbed into his seat he saw the horse run into the track from the north side of the track immediately in front of the engine and called to the engineer and that the horse was struck, in a few seconds. The section foreman testified that he within a hundred feet of the engineer and engineer sitting on the right side of the engine during the time could not see a horse on the track 15 feet ahead of the engine. Witnesses for appellee testified that the distance more than 100 feet west of the accident, the curve of the track is so slight as to be almost imperceptible to the naked eye. There is no evidence as to whether the fireman that the fireman saw the horse. If he did not see the horse, there was no failure to exercise due care and diligence after discovering the horse or even in discovering it.



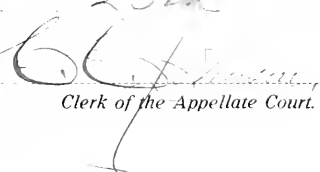
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this .
A. D. 1917.

25th

day of April,


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Corn Belt Bldg. & Loan Assn.,

Appellant

vs.

No. 23

October Term, 1916.

Citizens' Nat'l Bank of Evansville

Indiana, et al,

Appellees

2001A.311

ERROR TO
APPEAL FROM

Circuit

COURT

Edwards

COUNTY

TRIAL JUDGE

HON.

J. C. EAGLETON



October 10, 1910.

Loan Association,)
 Appellant)
 v.)
 Citizen's National Bank of)
 Evansville, Indiana, et al,)
 Appellees.)

Opinion by Higger, J.

---810---

Appellant, Loan Association, a corporation, association,
 foreclosed a mortgage on the property and sold it in 1908,
 and became the purchaser thereof at the sale. The mortgage
 in Chancery of Lawrence county for the sum of \$10,000,
 interest and costs, and for the same of \$1,000, and
 received a certificate of purchase therefor. After the
 twelve months allowed by statute for the redemption of the
 property by the mortgagor had expired, and before the ex-
 piration of the fifteen months period allowed for the
 creditors to redeem, to-wit, the fifteen months period of
 Evansville, Indiana, obtained judgment against the bank
 for the sum of \$10,000, and \$1,000, and costs, and an
 execution therefor issued for the sum of \$11,000, and the bank
 in the hands of the sheriff of Lawrence county for the
 sum of \$17,000, including costs. The sheriff ordered the
 execution to levy on the property, and the certificate



of redemption to appellee and advertised the property for sale on May 14, 1915. The certificate of redemption did not contain a correct description of the land then owned for record but before it was recorded and in the hands of the sheriff, it was corrected by attorneys for appellee. The sum of \$2751.25 deposited with the sheriff by appellee was less than the amount bid by appellant at the sheriff's sale, together with interest thereon up to the time of the deposit. This was due to a mistake by attorney for appellee in calculating the interest and does not appear to have been discovered by any one until after the filing of the bill and is case on May 15, 1915. Appellant paid the taxes on the property for the year 1913 amounting to about \$37 and filed the receipt therefor with the register in Chancery. Appellee paid the taxes for 1914 but the amount deposited by him with the sheriff did not include the taxes of 1913 owing by appellant. Allen J. Walker, attorney for appellee testified that on the evening of May 14, having learned that appellant had paid the taxes for 1914, he told Curt Thornton, secretary of appellant, he would on the next day pay him these taxes and any other amount legally due the building and loan association. This Mr. Thornton denies but admits he left town the next day so these taxes could not be paid or tendered to him. The shortage in interest had not then been discovered. At the sale of May 14, 1915, J. J. Windry, who appeared at the trial below as one of the attorneys for appellee, informed of the sheriff what bid he already had on the property and was told \$2751.25. Whereupon Windry bid \$2750 and was declared the purchaser. At his request the sheriff gave him

until six o'clock that evening. On May 10, 1880, at that time the Sheriff, after consulting an attorney, executed and delivered to appellant a deed for the premises, which was recorded. Appellant never at any time confessed to the Sheriff any money, and neither does the evidence disclose whether he was adding for himself, or acting as agent for any person. On May 10, Thornton and Appellant were in the room, the place of the sale, to receive the purchase money of seven miles, and sought to induce the master in chancery, at five o'clock in the morning to execute a deed to the property to appellant. The master in chancery having possession of the sale and a duplicate of the deed on the 14th refused their request. Then Thornton and Appellant returned to the city, about eight o'clock A. M. the same day, where J. Walker, attorney for the bank tendered to Thornton \$100 in cash to cover the amount paid by appellant for taxes, the interest of 1% in interest, and any other sum which might be due the building and loan association, which was refused. On the same day appellant filed its bill against the bank, master in chancery and sheriff to set aside the bank's deed, and compel the master in chancery to execute and deliver to appellant a deed to the premises, as purchaser under the foreclosure sale. When the case was called for hearing the bank tendered in open court \$50 to cover any amount due appellant, which was also refused. On the hearing the court dismissed the bill for want of equity.

The validity of the redemption by the appellee bank and the sheriff's deed to it were upheld in this court in the recent case of *Banker v. Citizen's Nat. Bank of Knoxville*,

Ind. opinion filed November 13, 1910, and the facts were fully set forth but no attempt was made to carry out the case.

By the order of the sheriff, appellant required no title to the land, and the sheriff had only the right to receive the money for the land, or in case no redemption should be made either by the owner or the equity of redemption or by a judgment creditor, to deliver a master's deed at the expiration of the period of redemption. *Strauss v. Anderson*, 201 Ill. 74; *Spencer v. Nelson*, 241 Ill. 47; *Wetherland v. Long*, 243 Ill. 45. It is true appellee should have deposited the money with the sheriff and paid the taxes for 1913, but as such money had not yet been discovered and the writer of the tax deed, appellee made an honest and earnest effort to pay same to the sheriff. That appellee did not receive same on the 24th, the last day of the period of redemption, is the fault of his secretary, who purposely avoided the possibility of the tender to him and it has since steadfastly refused to accept same. It is contended by counsel that the redemption by appellee is invalid because sufficient money was not deposited with the sheriff for that purpose and that on or about 1913 to it was made on any day is one day after the expiration of the period of redemption. It is also contended that the fault of appellee's secretary, who was not a party to the sale, so that no tender could be made to the sheriff.

The supreme court in this case has repeatedly said that a liberal construction is to be given to the Illinois laws, to the end that the property of the citizen may be

[illegible]

Amelie had been bid with the bid of 2,200 and Lindry's bid of 2,200 was not greater than the bid of 2,200 plus interest thereon and the costs of the execution and the sale. Neither did Lindry make any effort to comply with his bid. It was a cardinal duty of the sheriff to execute a deed to the land and to take the same with. The correction in the certificate of sale was made by attorney for Amelie in the presence and with the consent of the sheriff before it was recorded, and it renders the same invalid. It was the duty of the sheriff to take this certificate and the mistake was made without fraud or negligence on the part of Amelie, who should not be prejudiced thereby. *Harvey v. Connor* 200 Ill. 41; *Tracy v. Baldwin*, *supra*.

There is an absence of fraud in the record of any fraud or deceit on the part of the sheriff and the equities of the case are clearly with it. The decree of the trial court will be affirmed.

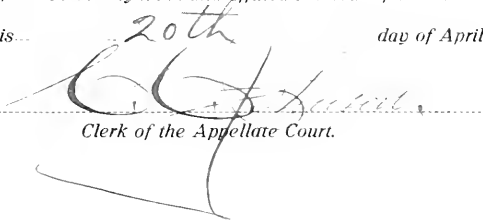
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this...
A. D. 1917.

20th

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Henry T. Witwer,

Appellant

vs.

No. 29

October Term, 1916.

John H. Curry,

Appellee

206 I.A. 318

ERROR TO
APPEAL FROM

Circuit

COURT

Hffingham

COUNTY

TRIAL JUDGE

HON. WM. B. WRIGHT



October term, 1916.

| | | |
|------------------|---|-------------------------|
| Henry G. Witwer, |) | |
| Appellant |) | |
| v. |) | Special term 1916-1917. |
| John M. Curry, |) | |
| Appellee |) | |

Opinion by Lipbee, J.

This is an action instituted before the justice of the peace by appellant, Henry G. Witwer, to recover for damages done to his automobile by the collision with appellee, John M. Curry, at a place where he had left it for repairs. Appellant secured judgment before the justice for \$50. Appellee appealed to the circuit court of Williamson county and filed a petition for the tortious damage furnished by him and labor performed by his employees in repairing the car. Trial was there had before a jury and a verdict was returned in favor of appellee for \$75.50. Motion for a new trial was overruled and judgment entered on the verdict from the jury and on appeal to this court. The real question in controversy in this case is one of fact, and it is the province of the jury to determine all questions of fact. It is a rule as well established that a verdict in civil cases is required to support it, and a verdict will not be set aside whenever there is a possibility of error, if the



facts and circumstances in proof, by a fair and reasonable
intendment will authorize the verdict. The question of fact
in this case was determined by the jury, there was no error in
their verdict and it should not be disturbed.

It is urged on the part of appellant that the ver-
dict and instruction given on the part of appellee was erroneous.
This instruction stated that in order to recover appellant
must show by a preponderance of the evidence that his prop-
erty was damaged through the negligence of appellee and that
he exercised reasonable precaution to prevent such damage.
This instruction is inaccurate and does not appear to apply
to the facts in this case. The trial court was properly
moved to give it because appellee had failed to carry away
from the grounds of appellee. The instructions are, however,
to be considered as a single series, and when so regarded,
it is sufficient if, as a whole, they state the law cor-
rectly, even though one or more of them contain some error or
omission. (Houderwood v. Leiding, 177 Ill. 431; Central Ry.
Co. v. Hannigan, 151 Ill. 40). The instructions as a whole in
this case fairly and correctly advised the jury of the law
applicable to the facts in proof, and fully justified ap-
pellee's verdict of the law. The error in this instruc-
tion could not have misled the jury and the giving of it
should not cause a reversal of the judgment.

Finally, no material error in the record or the judge-
ment of the trial court is affirmed.

Reversed.

Not to be printed in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ...
A. D. 1917.

25th

day of April.

Clerk of the Appellate Court.

NON

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Neil H. Crossett,

Appellant

vs.

No. 34

October Term, 1916.

Lilla Wittmore,

Appellee

206 I.A. 320

ERROR TO
APPEAL FROM

Circuit

COURT

Larion

COUNTY

TRIAL JUDGE

HON.

W. E. WRIGHT

October, 1917.

Neil L. Crockett,)
Appellant)
v.) April Term 1917
Milla Withers,)
Appellee)

Opinion by Justice, J.

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This is an appeal from the decree of the circuit court of Marion county, dissolving the marriage of Neil L. Crockett, appellant, and Milla Withers, appellee, to modify a decree of divorce entered by that court at the September term, 1916, in the case of Neil L. Crockett, complainant v. Milla Crockett, defendant.

The defendant has since married again and is now Milla Withers.

In the decree in the divorce case the court found that the parties were married November 2, 1914 and that on April 3, 1917 the said defendant without any reasonable cause deserted the said complainant. The court found also that at the issue of said marriage a child, Neil L. Crockett, was born on October 1, 1915 and was then in the custody of the mother in the county of Marion, and that the said mother was contributing \$1 per month to the support of the child and was to continue to contribute to the support of the child at the rate of \$1.50 per month until the further order

of the court and awarded the custody of the child to the mother. The prayer of the bill in the divorce case was that the decree in the divorce case be modified so as to relieve appellant from the payment of said child support and awarding the care, custody, control and education of the child to him. At the time the decree for divorce was entered appellee was and had been for two years prior thereto living with her mother in St. Louis and the child had been with her all that period, save for one visit of about three weeks with the father in Joliet, Illinois. On the day of the hearing in the divorce case, it was agreed by appellant and appellee that if appellant would turn over to appellee certain letters which she had written him and which he claimed were violations of the Federal Statute, she would not contest the case. The decree in that case so far as the custody of the child was concerned, was virtually a foregone conclusion. Appellant is a clerk, industrious and of good reputation, living with his sister and aged mother, in Joliet, Illinois, and earns \$15 per week. Appellee lives in St. Louis, Missouri, and as shown by the evidence, is a woman of good repute in her community. The child at the time of the hearing in this case was about nine years of age, was a good student and is being well taken care of by his mother.

Counsel for appellant urged that the trial court erred in not permitting him to introduce in evidence copies of the letters turned over to appellee at the time of the divorce hearing. The evidence disclosed that prior to that hearing threatened to prosecute her for sending such letters through the mails. Upon her present suit to contest

the divorce case appellant or his attorney introduced these letters from an affidavit in the file and delivered them to her. Without her knowledge he had kept copies of them and it was these copies he sought to introduce in evidence. Counsel urges that all proofs in the divorce case were admissible in the present case. These letters, however, were not shown to have been introduced in evidence in the divorce hearing. On the contrary they were delivered to appellee before the hearing and the chancellor properly excluded the copies on this hearing.

It is also assigned as error that the findings and decree of the trial court are contrary to the law and the evidence in the case. It is true that ordinarily in case of the separation of parents the court will not permit the child to be removed beyond its territorial jurisdiction. In this case, however, the child was in St. Louis, Missouri at the time the decree in the divorce case awarded him to the father and had been there for two years prior thereto. His father was known to the father and no doubt to the court at that time. That the court awarded the child to the father under those circumstances was due, beyond question to the fact that the father consented to the same in accordance with his agreement with the mother. The conditions at that time existed have not materially changed. No good reason has been shown by the proofs why the father and custody of the child should now be changed from the father to the mother upon whom the decree for divorce was entered.

As the mother has since married, and the child is

might well have modified the provisions of the decree, but that was a matter largely in the discretion of the President. The discretion does not appear to have been exercised in this case and the decree should be affirmed.

Very respectfully,

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

25th day of April.


Clerk of the Appellate Court.

NOINI

||

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

O. R. Morgan,

Appellee

vs.

No. 38.

October Term, 1916.

City of Vienna,

Appellant

206 I.A. 322

ERROR TO
APPEAL FROM

Circuit

COURT

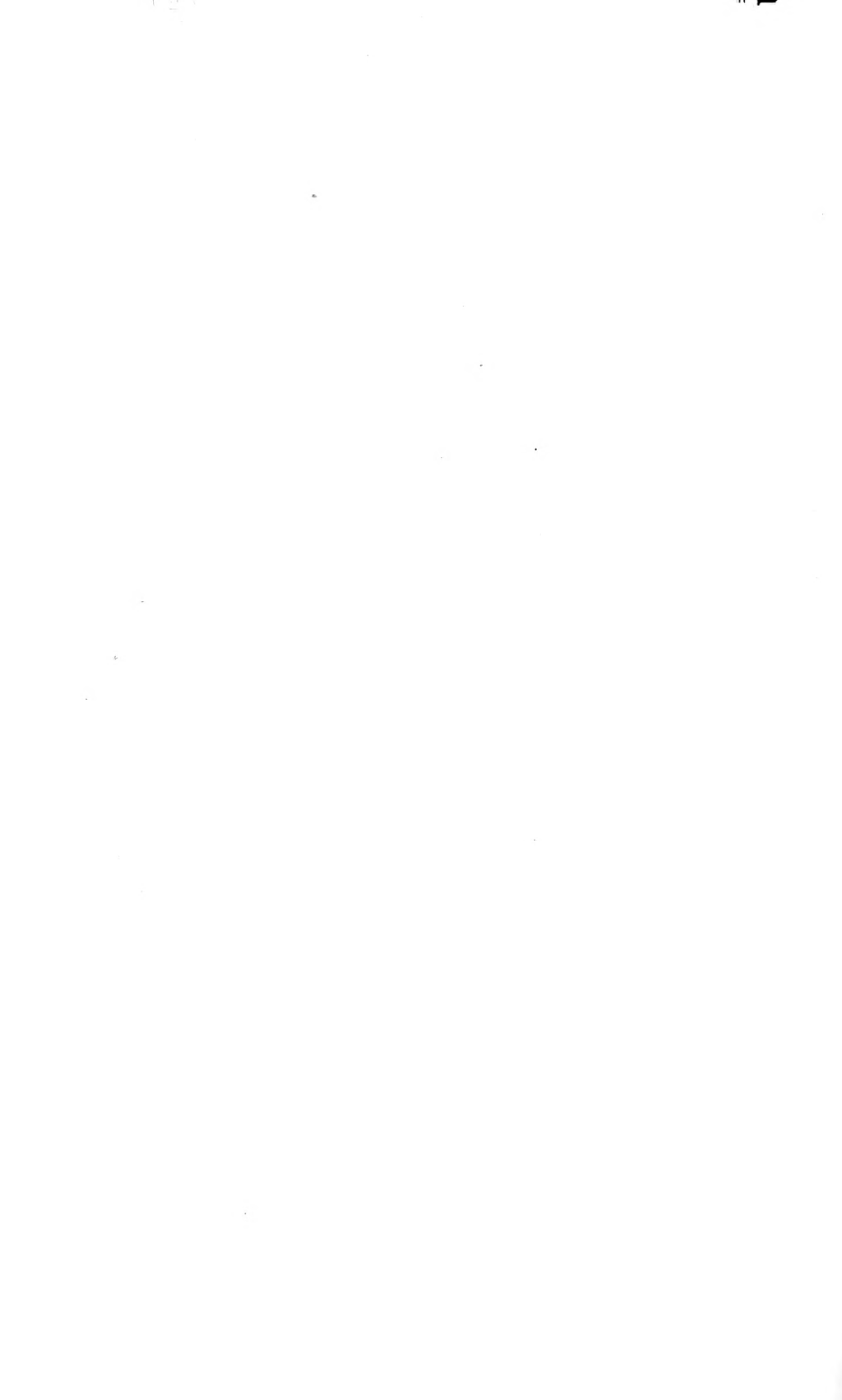
Johnson

COUNTY

TRIAL JUDGE

HON.

W. H. BUTLER



October Term, 1918.

| | | |
|-----------------|---|------------------------|
| W. A. CLEGG, |) | |
| Appellee |) | |
| v. |) | General Isaac Johnson. |
| City of Vienna, |) | |
| Appellant |) | |

Opinion by Wigmore, J.

In February, 1903, appellee, W. A. Clegg, purchased block 36 in Chapman and Gray's Addition to the city of Vienna. In April, 1915, appellant, the city of Vienna, through its street inspector and servants, constructed a sidewalk along the north side of this block against the objections of appellee. Appellee's predecessors formerly owned the land immediately north of this block. Her husband actually has used and had the control of both her land and block 39. Sometime prior to 1870, while appellee had control of these lands he built a rail fence just north of the north line of block 39 about where the north edge of the walk now is. About 1870 or later this fence was replaced with a post and plank fence, portions of which were still visible when appellee purchased the property. Appellee graded and sodded the premises and kept the grass mowed to the line of this old fence, which would be a few feet north of the north line of block 39. In 1900, Appellee's W. Clegg sold some of the land owned by



not of any portion thereof, which was at that time in the possession of another. The date of this deed was June 1, 1897. A fence had been built prior to 1897 on the north line of the strip of ground in controversy, and it is a fact that the fence, or the one in being at, remained standing until 1913. There is no evidence that plaintiff exercised any control over the land south of where the fence was, prior to the building of the same in 1913. We are therefore inclined to the opinion that the proof is not at all clear of the dedication and possession of the particular strip of ground in question.

The judgment must be reversed on account of erroneous instructions given. The fifth and sixth instructions given in behalf of the appellee advised the jury that punitive or exemplary damages could be awarded in this case. Our attention has not been called to, and we have been unable to find, a decision in this state in which punitive or exemplary damages against a city have been sustained on a case of this nature. No justly such damages in any case, are not complained of most people of a civilized community, or either crime, violence, oppression or other wrongs must be shown. Justice lies in the case of City of Chicago v. Martin 111 Ill. 241 said, "It is generally acknowledged that a case could be made against a limited corporation justifying punitive damages." In City of Chicago v. Kelley 111 Ill. 271 the court said, "Punitive or exemplary damages are not to be given where the injury is merely an injury in itself which is correctly payable in the case of this class of corporations" (111 Ill. 271). "Exemplary damages



since was used by the court in the case of *McIntire v. Fisher*, 50 Ill.407. While it may be small it is a materiality in the possession of the ground in question and the value and against this objection it is not sufficient in the mind of the court, that the dedication and acceptance had been shown, yet there were no facts in mind in this case justifying the giving of the title to the land in question of appellee, under the foregoing instructions. The instructions were the more harmful because of the fact that the proof as to the actual donee as evidenced by the deed was not clear.

For the error in giving the evidence in this the judgment is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.



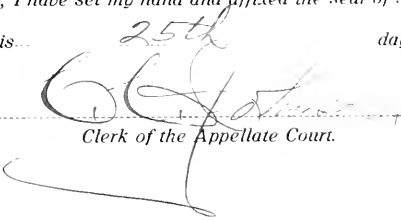
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this...
A. D. 1917.

25th

day of April,


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

| | |
|--|-------------------------|
| 206 I.A. 323 | |
| Farmers State Bank of
Tamaroa, Ill.,
Appellant | ERROR TO
APPEAL FROM |
| vs. | County COURT |
| No. 43
October Term, 1916. | |
| Mark Blanchard,
Appellee. | Perry COUNTY |

TRIAL JUDGE

HON.

LOUIS R. KELLY

October Term, 1916.

| | | |
|----------------------------------|---|-----------|
| Members of the Court of Appeals, | } | Appellant |
| Illinois, | | |
| v. | } | Appellee |
| Mark Blanchard, | | |

William H. Hays, Jr.

---S.C.---

Horton Brothers, Limited, Defendants.

Horton and James Horton, were engaged in a general merchandise business in the village of Tazewell, Illinois. They became heavily involved and soon their creditors were the Farmers State Bank of Tazewell, Illinois and the Walker Dry Goods Company of St. Louis, Missouri. On March 1, 1916, James Horton went to St. Louis and arranged with the Walker Dry Goods Company to assign to it all of their goods and cash accounts of Horton Brothers. On March 1, 1916, he returned to Tazewell with J. H. Mackin, a former partner of said Dry Goods Company and an authorized agent in writing, who executed and acknowledged by Horton Brothers, conveying to the Walker Dry Goods Company, their stock of merchandise furniture and accounts in the business, in the business, collect the same, sell the same at public or private sale, distribute the money among the creditors and if anything remained after the payment of the debts and

draw his bid of \$5.20 and filed one for \$5.00. The stock was sold to him at that price and he at once went into possession of the same. No list of the names of the creditors was furnished by or furnished to ^{him} ~~himself~~. On April 10, ~~plaintiff~~ ^{defendant} reduced its claim against the brothers to a judgment by nisi and default, in the sum of \$440.00 and execution was issued thereon and the sheriff levied the execution on April 14 on a portion of the stock then in possession of ^{defendant} ~~himself~~ to the value of \$440.16. ^{Defendant} ~~Plaintiff~~ served notice upon the sheriff to take charge of the property as his own and a trial of the title of the property was had, in the county court of Barry county, which resulted in a judgment for ^{defendant} ~~plaintiff~~ from which judgment the bank has taken an appeal to this court.

In this case the sole question to be determined is, was appellee the owner of the property involved at the time it was levied on. The transfer or assignment by Norton Brothers of the stock of Merchants, Discount and Finance Company to J. L. Barker was made down, and set in any particular comply with the requirements of the Bulk Sales Law and it is not contended by appellee that it does. The only right that can be claimed for the instrument of assignment or conveyance is that it constituted J. L. Barker the agent of the company for a time to sell the stock. It is a well settled rule of law that the principal is not bound upon the agent any further than the principal has authorized the matter of the agency than the principal has authorized. Norton Brothers could not sell this stock of stock in bulk

ithed v. Thomson, 33 Ill. 44, 1876, that "the title to the property assigned, still passes in this case by the voluntary act of the debtor, as by a common law assignment, but when the assignment is made for the benefit of creditors it is in and against the distribution of the assets." In this case no attempt was made to show that the creditors viewed the assignment as one made for the benefit of the estate, and it is not even suggested that the estate still control in the distribution of the assets, so the claimed assignment cannot be held to be valid even as a common law assignment against creditors and consenting third parties.

It is further contended that even if the transaction is not a valid common law assignment, appellant consented to the arrangement and by his action is not precluded from objecting to what was done. This presents a more serious question. To maintain his position appellant relies upon the testimony of the witness Lechner, a representative of the Chicago City Cigar Company, who testified that on one occasion the president of appellant told him the bank would consent to the arrangement and that in about 10 days thereafter the president told him he would send the Chicago City Cigar Company the bank's acceptance of the arrangement, but a few days later the officials of the bank told him "the bank had changed its mind". This witness testified he then inquired of the president who told him the bank would consent to the arrangement if the matter was put in court in which case of course the bank would lose, and the witness after talking on this point, was unable to recall; that he was informed the president said that the bank had told him they

were going ahead with the sale just the same and the president replied, "Oh well, I don't think we'll bother you any more." On the day of the sale the president wrote by letter to the creditors (on top of calling for the sale and the evidence does not disclose any positive act of assent signifying its assent to the arrangement for the sale, but does show that at least at the time it was being objected to the sale. In Illinois v. Board of Education, 308 U.S. 497, in discussing a question very similar to the one now under consideration, the court held that persons occupying the position of appellants here, were not bound to give notice of any objection to that has been held, and the fact that nothing was done by them in affirmance or disaffirmance of the arrangement was not proof of assent. The court held that in the absence of proof of assent to the arrangement, the objecting creditors are not bound by the arrangement, unless either it was valid in law or the creditors' conduct with reference to it, or the property or the other parties in interest had been such as to preclude them from objecting to it. In this case the arrangement has been held invalid and the evidence does not show appellants assented to the arrangement, or that their conduct with reference to it, or the property or the parties in interest was such as to preclude it from objecting.

It was of opinion the trial court had properly found the rights of property for appellee and the judgment is accordingly reversed and the cause remanded.

Reversed and remanded.

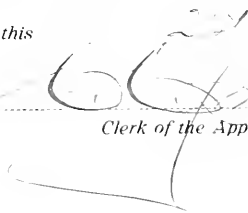
Not to be re-argued in 1931.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

day of April,


Clerk of the Appellate Court.

NOINI

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Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Manuel E. Boals,

Appellant

vs.

No. 44

October Term, 1916.

Alexander Wegener,

Appellee

206 I.A. 325

ERROR TO
APPEAL FROM

Circuit

COURT

Madison

COUNTY

TRIAL JUDGE

HON.

LOUIS BERNHEIMER



Term 2. 44.

October Term, 1917.

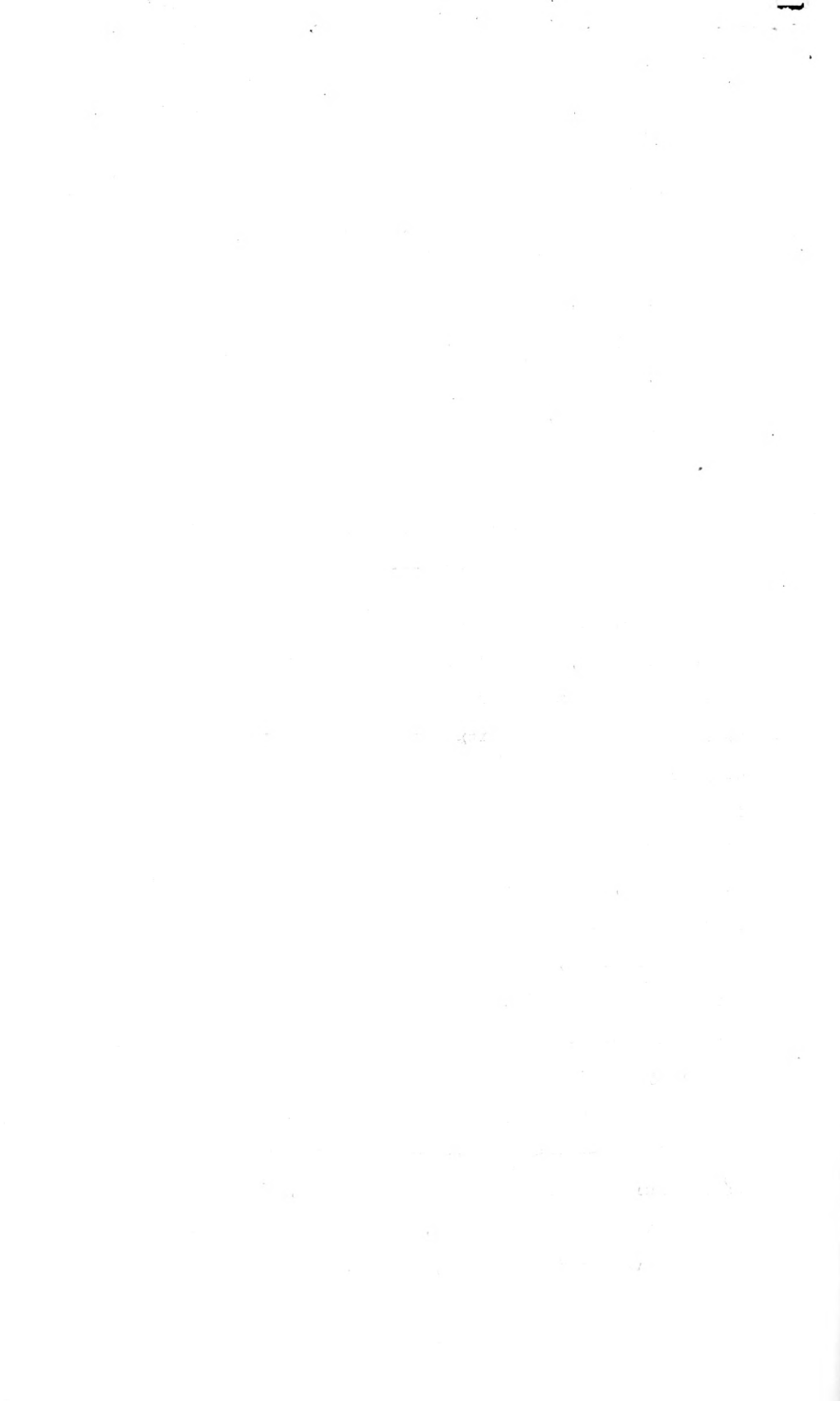
Manuel L. Loels,)
Appellant)
v.) Appeal from Judgment.
Alexander Lecher,)
Appellee)

Opinion by Justice, J.

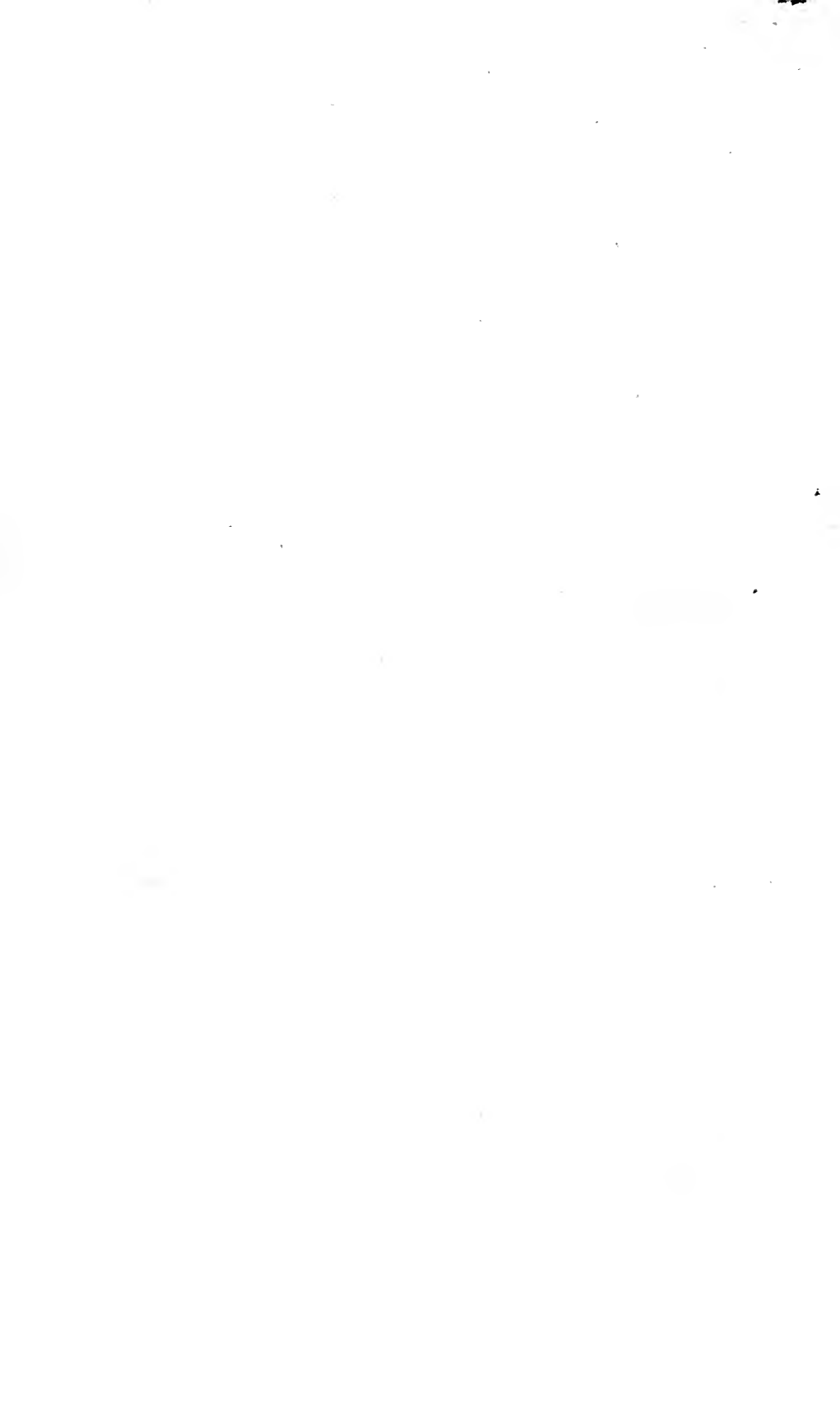
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This is a bill in equity for contribution by Manuel L. Loels, appellant, against Alexander Lecher, appellee. The suit was originally commenced as a bill in assumpsit for contribution but was transformed on the very side of the court and a bill of contribution. The issue of fact was made up and the court, at the close of appellant's evidence the court, at the request of appellee, instructed the jury to find the loss of the latter.

In 1911, one J. Lundstrum contracted to build churches in St. Louis, known as the Lutheran Church and the Poor Church. He gave the appellee as surety for the churches as surety on his bond for the faithful performance of the contract. The surety company in turn gave appellant as surety with appellant and appellee as sureties. The contract of indemnity provided among other things, that the surety would save and keep harmless, said surety company, from all claims against every and all claim, demand, liability, cost, and expense,

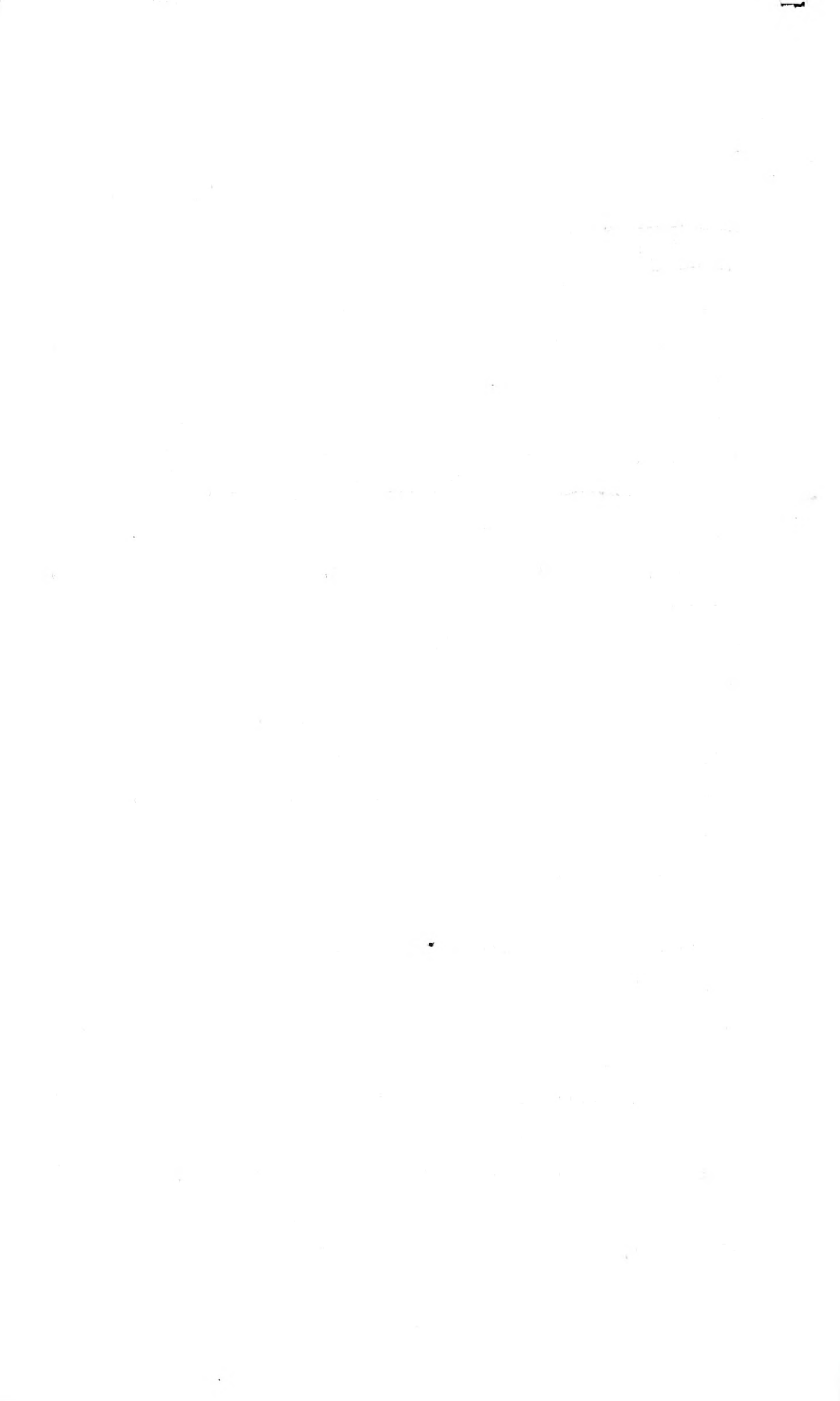


counsel at, a case, suit, order, judgment, or decision in
whichever, which the said county of [redacted] by [redacted] for [redacted]
any cause, it may be, [redacted] in [redacted], [redacted] in
consequence of the said [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]
undertaking". Undersigned, after consulting with
churches, became financially involved and practically aban-
doned the work. The county [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]
notified [redacted] of Undersigned's default and [redacted] [redacted] [redacted] [redacted]
him and [redacted] to give and bear it [redacted]. [redacted] [redacted] [redacted]
son, William J. Soles, went to [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]
ditions of the churches and notified [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]
complainant
[redacted] were expected to protect the county [redacted] in
[redacted] [redacted] [redacted] [redacted] [redacted] [redacted]
thematter. [redacted] told Soles, Junior, "You go ahead, and
if there is any shortage I will pay my portion of it."
William J. Soles then took charge of the matter and caused
both churches to be completed. Undersigned had been paid a
considerable part of the contract price before he left [redacted],
and it required several thousand dollars less than [redacted] [redacted] [redacted]
paid portion of the same to complete the churches. [redacted] [redacted] [redacted]
was president of the W. J. Soles Lumber Mill [redacted] [redacted] [redacted] [redacted]
his son William J. Soles was the secretary and treasurer of
Planing Mill Company and furnished a considerable amount of
the materials used in the building of the churches. [redacted] [redacted] [redacted]
deducting from the total shortage the amount of [redacted] [redacted] [redacted]
Mill Company's account, the sixty day notes [redacted] [redacted] [redacted] [redacted]
were given to the churches for the balance of the [redacted] [redacted] [redacted]
These notes on maturity were paid by the assets of the [redacted] [redacted] [redacted]
Mill Company. The amounts of the checks and [redacted] [redacted] [redacted] [redacted]
Mill Company's account for materials furnished, [redacted] [redacted] [redacted] [redacted]



on the mill's books to the personal account of ~~appellee~~ ^{is appellant}
~~appellee~~ ^{complainant} Lundstrom was adjudged a bankrupt and
~~appellee~~ secured a dividend from his estate, which he
applied on this shortage. ^{Complainant} Appellant also incurred personal
expenses in securing this dividend and completing the estate.
This suit was brought to recover from appellee one half of
such shortage together with interest thereon and expenses
remaining, after deducting his share of said dividend.

^{Defendant} Appellee told ^{complainant} Appellant's son in substance to go
ahead and complete the work and he would pay his share of
the loss, if any. This was in effect, under the circumstances,
shown to exist and the relations of the parties, a promise
to appellant and was sufficient authority for him to complete
the work and appellee should in equity be held to pay his
share of all reasonable costs incurred thereby. The question
arises whether the fact that the amount of the loss and the
planing mill company's account for materials furnished,
which were charged to appellant's account on the books of
the planing mill company, but it be considered the same as though ap-
pellant had paid those items in cash. It is claimed by
appellee that to enforce contribution between co-sureties,
there must be actual payment and satisfaction of the debt
by the surety who seeks to enforce the same; that the liability
of contribution is not complete until there has been pay-
ment of the debt; that the charging of a record on the account
is not a satisfaction or payment of the liability, but it
best is simply evidence of it. It is well settled, however,
that where one person is obligated to pay money for the use
of another, a payment made in any amount is equivalent to



and will be treated as payment in cash if received with satisfaction. In *Wolsten v. ...*, 11 Ill. 111, it was said in speaking of such a condition, that "where the payment is received as a complete satisfaction and the debt or obligation is extinguished it is a matter of no moment to the person to whom the payment was made, whether it was made in money, property or obligation. The benefit to him is the same and his obligation to refund should be the same." In *Meek v. Chaspin*, 12 Ill. 474, it was held that payment of a judgment on a bond by the check of a surety was a party to the suit of which a surety on the bond was a party, the check being charged to such surety on the books of the company, was payment by the surety, entitling him to contribution from his co-surety. When the amount of these notes and the Planning Mill Company's account for a balance were charged to appellant's account on the books of the Planning Mill Company, appellee was released from all obligation of payment of the same to the parties to whom they were owing and the transaction must be considered the same as though appellant had paid the items in cash. Appellee, however, should be required to pay his share of only such shortage as was as here reasonable and the burden is upon appellant to show what that amount is. 32 Cyc page 316.

While it is true that the verdict of the jury in this case would only be advisory and not binding upon the court, yet no good reason appears from the record why the court should have directed a verdict in favor of appellee. The decree of the court that the appellant be judgment in her of the action and against appellant for costs is correct.

appear to be warranted by the facts in this case. It should accordingly be reversed and the certificate of appeal issued for the amount which should properly be paid to appellant, may be ascertained by the court below for the purpose of this writ.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

25th
day of April.
Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 337

Charles Johnson,

Appellee

vs.

No. 53

October Term, 1916.

Robert C. Gould et al,

Appellants

ERROR TO:
APPEAL FROM

Circuit

COURT

Wabash

COUNTY

TRIAL JUDGE

HON.

J. C. EAGLETON



warranty, subject to a mortgage in favor of the plaintiff; that in pursuance of such agreement plaintiff did on the day turn over the said stock of property, and the said defendants, but the said defendants did not so to do have wholly failed and refused to execute, acknowledge and deliver to this plaintiff a deed whereby to give the real estate above described and also to release and neglect so to do, to the damage of the plaintiff of the sum of five thousand dollars. The second special plea is substantially the same. The defendants filed two general pleas and also special pleas denying they pretended to release Reinhold was the owner of the land and that they refused to execute and deliver to plaintiff a deed and that they averring they offered and attempted to deliver to plaintiff such deed and made repeated efforts to have a deed so. The third special plea alleged the defendant executed and delivered to plaintiff a deed, which as it was contained an erroneous description, and that as soon as the error was discovered the defendant, Reinhold, secured a new deed and executed and attempted to deliver to plaintiff a deed containing the true description and requested plaintiff to accept same which he refused to do. The plaintiff's motion to this third plea expressly denied the same therein and his replications to the third plea were filed. On these pleadings issues were joined and a jury was impaneled which returned a verdict in favor of plaintiff for \$1200. A motion for a new trial was overruled, judgment entered on the verdict and an appeal taken by the defendants to this court.

Appellant by action in equity to set aside the contract for the reason the contract is alleged to be incomplete. Leave was however, not granted to appellant to file an amendment to the petition which would have tiled the objection made by appellant to the deed made by Leipold and delivered to Johnson, and the deed was consummated, described as follows: "The north east quarter and the east half of the north west quarter of section twelve, etc. This tract is covered by the contract, to wit, the east half of the west quarter of the north west quarter, and the east half of the 36 acres not covered hereby. It is a 50 acre tract, a deed from one Leipold, which was delivered to Johnson, contained the following description: 'The west half of the north east quarter and the east half of the north west quarter of section twelve. Thus it will be seen that at the time Leipold executed his deed to Johnson, he conveyed to only 26 acres of the 50 covered by the contract, to wit, the east half of the north west quarter of the north west quarter and the 26 acres were not included in the deed made and delivered to Johnson, consequently Johnson received only 26 acres of the 50 acres by virtue of Leipold's deed on January 5.

Appellant says, however, the deed delivered to Johnson that within a reasonable time after the date of the deed the description was discovered to be incorrect and that Johnson was secured, and that he never intended to accept the deed, and that he would accept the deed, and that he intended to do so; that a short time after the date of the deed,

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.


IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this...

17th

day of April,

A. D. 1917.



Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Eugene Lanksford and Linnie

Lanksford,

Appellees

vs.

No. 59

October Term, 1916.

Charles Cruse,

Appellant

206 I A. 346

ERROR TO
APPEAL FROM

Circuit

COURT

Marion

COUNTY

TRIAL JUDGE

HON.

W. E. WRIGHT

on that occasion it did not make sense,

continued this course of conduct.

thereafter, regardless of the fact that the

and reported to the court that the

should be so and this matter was

returned to him and that he

testified it had been properly.

on the refusal of the court to

tion:

"The court instructed the jury that the contract is not a part of the consideration received by the vendor's remedy upon a breach of the contract, which he has none, but the right of the vendor to the amount of depreciation due to the breach of the contract is a remedy which the vendor is to be allowed to return the price paid."

This instruction is not applicable to the

law applicable to the vendor in a contract of sale.

It is true that in a contract of sale the vendor

that the vendor must retain the property

for its breach, but that is not the law.

and by its terms gives the vendor the

property in case of a breach of the contract.

of an executed contract of sale the true

the contract gives the vendor the right to

ty, in case of a breach of the contract,

in case of a breach of the contract, the

or deposit. *Woods v. Woods*, 100 N. H. 100.

100 N. H. 100; *Woods v. Woods*, 100 N. H. 100.

applies to the contract of sale of real

should take to the vendor the property.

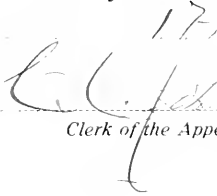
right to return it and receive each dollar money. Appellant denies he warranted the stove to make to Appellees, but testified, "I warranted it to make to work, and the fact that it was a thing I didn't have any control over is not then that reportedly. I told them if it didn't work, I'd take the stove back and pay them their money back." In his testimony it is admitted by appellant that the stove was to be returned if it did not comply with his warranty, and the question is what was the warranty and what was he doing therewith. Under this state of facts it is not proper to refuse this instruction.

Appellant's second revised instruction informed the jury if appellee paid appellant \$1.00 after the sale of the stove they could not recover. The trial judge then asked the account of \$1.00 turned over to appellant and paid to him until after complaint of the stove was made. The account was turned over to him at the time of the sale of the stove and with the consent of the appellees. Appellees then started with all title to it, and when they were concerned it was at that time appellant's account on the stove, regardless of when the money was actually paid appellant. As offered, the first and second instructions, given for appellant advised the jury in effect that appellees could not recover unless they could show from a preponderance of the evidence that appellant acted fraudulently or deceitfully in the sale of the stove. The court modified these instructions and advised the jury that appellees to return the stove in the warranty provided for the return of it in case of a breach of the warranty.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 17th day of April, A. D. 1917.


Clerk of the Appellate Court.

INION

=====

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

| | |
|---------------------|-------------------------|
| 206 I.A. 348 | |
| E. F. Anderson, | ERROR TO
APPEAL FROM |
| Appellee | |
| VS. | Circuit COURT |
| No. 62 | |
| October Term, 1916. | Franklin COUNTY |
| A. C. Terlune, | |
| Appellant | |

TRIAL JUDGE

HON.

CHAS. L. MILLER



Term No. 68.

Wm. H. C. Smith,
J. W. Smith,
A. C. Smith,
J. W. Smith.

Opinion by _____,

1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808

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filing of the order of \$1,000,000
to secure a valid title.

Attorney General

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the original report, dated,

the following is a summary of the evidence:

Fact 1: The jury.

Fact 2: The jury.

Fact 3: The jury.

Fact 4: The jury.

Fact 5: The jury.

Fact 6: The jury.

Fact 7: The jury.

Fact 8: The jury.

Fact 9: The jury.

Fact 10: The jury.

Fact 11: The jury.

Fact 12: The jury.

Fact 13: The jury.

Fact 14: The jury.

Fact 15: The jury.

Fact 16: The jury.

Fact 17: The jury.

Fact 18: The jury.

Fact 19: The jury.

Fact 20: The jury.

Fact 21: The jury.

Fact 22: The jury.

Fact 23: The jury.

Fact 24: The jury.

Fact 25: The jury.

Fact 26: The jury.

Fact 27: The jury.

Fact 28: The jury.

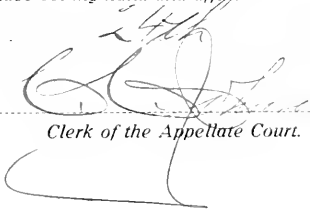
Fact 29: The jury.

Fact 30: The jury.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 24th day of April, A. D. 1917.


Clerk of the Appellate Court.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 350

The People of the State of Illinois,
Defendant in Error

ERROR TO
APPEAL FROM

vs.

No. 63
October Term, 1916.

County COURT

Mary Belew,
Plaintiff in Error

Madison COUNTY

TRIAL JUDGE

HON. HENRY P. EATON

Term No. 63.

October 10, 1911.

Mary Belew,

Plaintiff in error

v.

People of the State of Illinois,

Defendant in error.

Criminal Appeal.

---o---o---

An information was filed by the State Attorney of Madison county, charging Mary Belew with the crime of murder with intent under a warrant, and upon a trial in the circuit court of that county, she was found guilty and sentenced by the court to pay a fine of \$1000 and to stand committed until said fine was paid.

She has filed the record, together with the brief and abstracts and brought the case before this court for review, but defendant in error has filed no brief. The question presented is an important one and one of public interest and we do not feel justified in passing upon the absence of a brief on the part of defendant in error.

The judgment of the court below is affirmed pro forma and the cause remanded, under leave of the court, which provides for such action where the defendant in error fails to file a brief.

Not to be reported in 1912.

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

17th

day of April,

A. D. 1917.

CC Johnson

Clerk of the Appellate Court.

NOIN

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Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

L. E. Thorne,

Appellee

vs.

No. 75

October Term, 1916.

Southern Illinois Ry. & Power Co.

Appellant

206 I.A. 382

ERROR TO:
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON.

A. W. LEWIS

Note 17

J. J. Thorne,
Appellant,
v.
Southern Illinois
and Lumber Company,
Respondent

Division 11, 1911, 72

Appellee, J. J. Thorne, who resides in
in living on Grand street in the city of
Madison county. In 1911, appellee, the Southern Illinois
Lumber and Lumber Company, constructed a building
along Grand street in front of appellee's residence.
The building was occupied by appellee's residence. The
damages alleged to have been sustained by appellee's
property in the construction and operation of the building.
The principal damage claimed was that appellee's
living in the street. The case was tried to the jury.
The verdict in favor of appellee for \$10,000. Appellant
appeals seeks to reverse the judgment entered.

Appellant claims that the trial court erred in
refusing to give and refusing instructions to the jury.
in regard to the evidence, and that the jury was
misled by the evidence. The court refused to give

[illegible]

It is "quoted" by respondent that the
1 given in behalf of the seller, and the
her "legal right" of ingress and egress
her "lease" of ingress and egress. The
instruction is not a reversible error. The
given it by the seller, and the
tion with the facts in issue. The
counsel also contends that the
requires the jury to find that the
renderance of the evidence. The

normal and accurate, p.

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ly advise the jury

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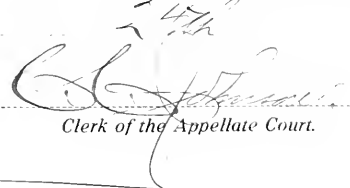
of the court, to

not be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above-entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 14th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINI

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(3) 11-17

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

| | | |
|---------------------|--|-------------------------|
| Anthony Bohm, | | 206 I.A. 374 |
| Appellee | | |
| vs. | | ERROR TO
APPEAL FROM |
| No. 84 | | Circuit COURT |
| October Term, 1916. | | |
| Hunter Dalton, | | Ladison COUNTY |
| Appellant | | |

TRIAL JUDGE

HON. J. F. GILHAM

Form No. 84.

October 11, 1937.

Anthony John,

Plaintiff

v.

Robert Mallon,

Defendant

Case No. 10000.

Division of Motor Vehicles, D.C.

Appellant, Anthony John, does hereby certify that he is the owner of the automobile described in the first count of the complaint against appellant in the case of Anthony John vs. Robert Mallon, in an action on the case, brought by the plaintiff for personal injuries sustained by him on October 11, 1937, while being struck and injured by an automobile.

The declaration in the case of Anthony John vs. Robert Mallon, referred to in the arguments on the original complaint and the original count. The first count of the complaint states that while appellant was driving his automobile near its intersection with Fourth Street, N.W., of Madison, a defendant automobile, owned by Robert Mallon, was traveling along said Madison Avenue to the intersection of said street and injured by the said automobile. The defendant is liable for his own negligence. The first count is stated in a section 1 of the Code of Illinois and states that a defendant automobile was injured while traveling on said

along Madison avenue and not observing or giving heed to any of the requirements of said section, and that he was in the exercise of due care for his own safety. The third and second additional count is based on a violation of the Motor Vehicle law and events that occurred as a result of the injured by appellant's automobile, and that he was driving some along Madison avenue in violation of said section ten and that he was driving some at the rate of fifty miles per hour at the time of the accident and that he was in the exercise of due care for his own safety. The third and fourth counts aver that Madison avenue at or near its intersection with fourth street passes through the closely built up business portion of the village of Madison. The fifth or third additional count charges appellant with reckless and wilful negligence. The case was heard and argued a jury, which returned a verdict in favor of the plaintiff.

The evidence shows that the accident in question occurred about five o'clock p.m., March 20, 1910, at the intersection of Madison avenue and fourth street in the village of Madison. Madison avenue runs north and south, and is intersected by fourth street running east and west. The street is not paved. In the center of the intersection is an unpaved portion about twenty feet in width, in the center of which are located two street car tracks. This portion is covered with what is known as gravel and is used exclusively for street car traffic. On each side of this unpaved portion the street is paved with wooden blocks and each paved portion is about twenty feet wide. The eastern paved portion is used exclusively for vehicles going south and the western paved portion

for vehicles traveling south over the same road.
going north over the avenue at the intersection with Federal Avenue.
intersection with Federal Avenue.
there was a car in the intersection at the
the northeast corner of the intersection.
ed the corner of the intersection.
portion of the avenue to the intersection.
lived at New York, New York.
and was employed as a carpenter at the
boundary company, whose place in the
from the intersection of Federal Avenue
which he, told he quit work about 4:30 p.m., and that
some twelve or fifteen minutes before the
east corner of the intersection.
street to wait for a north-bound car.
street south and on Avenue at the intersection
three or four blocks and there he was
view for that distance. A street car
passed on the "Yellow Line" and he saw
and by the time it reached the intersection
train had and fourth street and he
stepped down from the sidewalk and
prevented by the car or else he was
it started west of the intersection and
at least a few feet before it
took a track they at the intersection
to be, and admitted the car was
even telling him that the car was
Yellow Line's responsibility and he
the witness and he was at the intersection.



[illegible]



that as he was on the left side of the car, he was
born and continued to be on the left side of the car.

The witness then said, "I was on the left side of the car
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The witness then said, "I was on the left side of the car
at the time, and I was on the left side of the car."

are corroborated by the appellant's testimony, and the appellant testified that she was in the car at the time of the accident. The appellee stopped only a few feet from the car and was struck. The witness, John McCormick, testified that the engine of the machine, when it was started, said as a matter of fact that it was in the negligence per se under the law. The evidence of fact to be submitted to the jury is the circumstances surrounding the accident. In the case of *McCormick v. Kearson*, 1911, 100 Cal. 115, 33 P. 2d 115, the court was at fault in failing to find that the appellant was negligent under the circumstances in proof in the case. The question of fact to be determined by the jury in this case justified a finding by the jury that the appellee was negligent in the care of the accident, as well as in the care of his own safety.

The second alleged error of the court is that the evidence does not show that the appellee was negligent in the operation of his automobile at the time of the accident. The witnesses testified that at the time of the accident the appellee was driving his machine at a rate of from 15 to 20 miles per hour at a place where the state of the road had the effect that a speed in a case of this kind would be negligence. A law providing that a vehicle at a greater speed than the speed of the road, the closely built up business portion of the city, and the village is not a license to run a vehicle at that rate of speed, if it is not a

under the circumstances of the case, ()
Washburn 157 111. (1832).

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be found to be ()
negligence on the ()
a preference of ()

The trial ()
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of employee was ()
which ()
on this subject at ()
instructs the jury ()
plaintiff, because ()
witness stand, ()
libertians, ()
case, and not ()
not claim that the verdict is ()
system, ()
have been ()
error in refusing the ()

Appellant ()
giving the following ()
court instructs the jury ()
no person shall ()
in this state ()
proper, ()
or as to ()



lent does not contend that the instruction of the jury was erroneous. The instruction stating that the jury should find the defendant guilty if the State proved to the jury beyond a reasonable doubt that the defendant held in numerous cases in which the defendant was convicted by giving an instruction which was not in violation of the statute, and this instruction was not in violation of the statute. (See also v. Colburn 187 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

The verdict in this case is affirmed. Since, a reversible error was found, the judgment of the trial justice appears to be correct, and the judgment will be affirmed.

Affirmed.

Not to be reported in 1911.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this .
A. D. 1917.

25th

day of April.

66/5

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ~~Thirteenth~~ ^{Eighteenth} day of ~~April~~ ^{June}, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Otto Freise,

Appellee

vs.

No. 5
MARCH
October Term, 1916.

Metropolitan Life Insurance Co.,

Appellant

206 I.A. 104

ERROR TO
APPEAL FROM

City

COURT

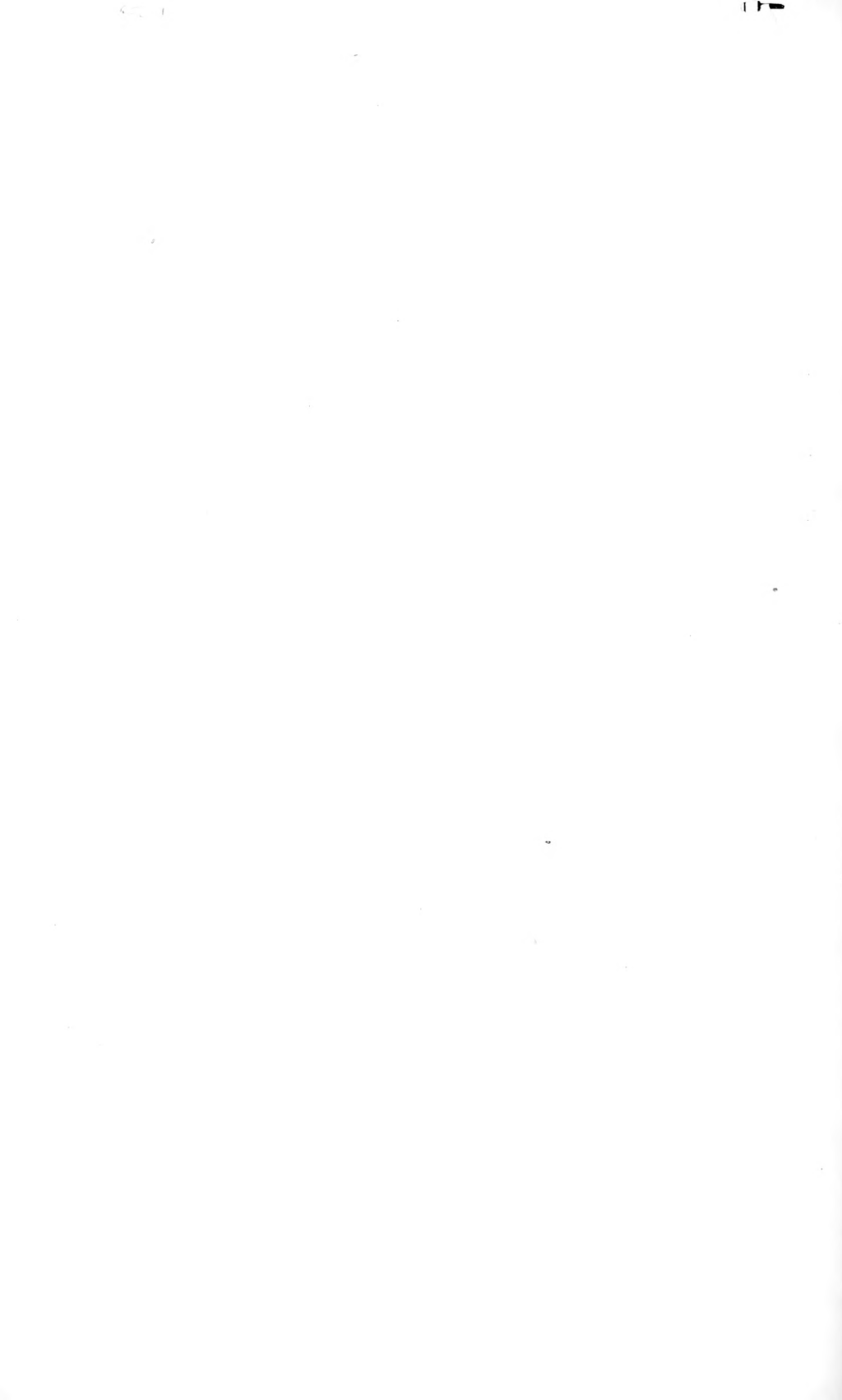
East St. Louis

COUNTY

TRIAL JUDGE

HON.

W. M. Vandeventer





the date when the premium and the amount of the premium were received for in the book by the agent for each payment was made.

The policy in issue here contained a provision that it was incontestable after two years, which clause as follows: "The price of your policy shall be paid by the payment of every premium after the first year, the time the insurance should continue in force. If death occurs within the days of grace the over-due premium shall be deducted from the amount paid hereunto, but without this concession nor the acceptance of any over-due premium shall create an obligation on the part of the Company to receive premiums which are in arrears over four weeks. Should this policy become void in consequence of non-payment of premium it may be revived if not more than fifty-two premiums are due upon the payment of all arrears and the presentation of evidence satisfactory to the Company of the sound health of the insured."

It also appears from the said clause of the policy that, its terms cannot be changed or its provisions varied, except by a written agreement signed by the President or Secretary of the Company, therefore agents, (which term includes superintendents and assistant superintendents, are not authorized and have no power to execute, alter or discharge contracts, void or annulable or revive policies on policies in arrears more than four weeks, to credit for same in the receipt book, and all such policies given to an agent shall be at the risk of the agent and shall not be credited upon the policy, whether entered in the receipt book or not. If this policy is, or shall become void,





stipulated as one of the conditions upon which the policy shall continue in force, that a failure to pay such premium forfeits the policy, and does not constitute a breach of the condition in the case of an insured. In the case of an insured, the insured is to recognize that where a policy of insurance requires a premium to be paid within a prescribed time and such premium is not so paid, then the policy becomes forfeited, unless there are conditions and circumstances showing a waiver of such forfeiture, and it is pointed out in the case that in such as the insured had failed to pay annual premiums, three months, within the 10 weeks of grace, and that notwithstanding such failure the insured had not forfeited the policy, but accepted the premium and continued it in force, that the insured had a right to rely on the fact that the agent could not forfeit the policy on account of such default in payment. If the insured intended to rely upon the clause giving it a right to forfeit the policy for non-payment within the weeks of grace, then it should act, by its conduct, have had the insured secured to believe that such forfeiture could not be enforced. It is said by the Supreme Court of this State, that it is void that the provision in the policy requiring the agent to receive the payment of the annual premium was inappropriate in the contract for the benefit of the insurance company. The policy is not necessarily void if the premium was not paid when due. The company has the absolute right to receive the premium if it is proper, and the insured with the payment of the premium at the time it is due. If the insured is not by the insured or agent in this case, then notwithstanding the clause of forfeiture the policy will not be void if the premium is not



paid when due, the company cannot avail of the clause. If the practice of the company, and its conduct in dealing with the insured, have been such as to induce a belief on the part of the insured that the company will not avail of the clause in such a case, the company cannot avail of the clause. Such a belief may be induced by the conduct of the company in such a case, and in such a case the insured is entitled to recover. (Illinois Life Ins. Co. v. [redacted], 101 Ill. 450.)

It further appears from the evidence in this case that when the appellee went to pay the premium under the policy of the insured, that the policy had been forfeited, but so far as the records of the office of the agent disclosed it was still in force and the premium was accepted. There is evidence that the agent was not helping, even the failure to advise the insured of the forfeiture of the policy. At other times when the insured was called to make payments they did not advise of the forfeiture of the policy, but continued to accept the premium. Inexpiring, the insured complied with the terms of the policy. It is further said by the Supreme Court in the case of [redacted] Life Ins. Co. v. [redacted], 101 Ill. 450, that the insured was not notified, and on July 2, 1907, paid to the insured the premium for the time the policy in force to permit the insured to continue. This clearly shows that the company had not decided to forfeit the policy for the insured's failure to pay the premium when due, but that the policy had not been forfeited in the policy had been waived. (Illinois Life Ins. Co. v. [redacted], 101 Ill. 450.) The insured's failure to pay the premium when due at the time the policy was in force and the company had not decided to forfeit the policy. Several authorities have been cited by counsel for the appellant to the effect that the payment of



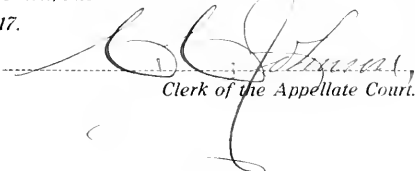
appellant by its counsel had waived any right it might have had to insist upon a failure of the police, and that there was no error in rendering a verdict and award for the appellee, and the judgment of the lower court is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this. 26th day of April, 1917.


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 114

Henriette Dannenberg,

Appellee

vs.

No. 15
March Term, 1917
~~October Term, 1916~~

Circuit COURT

George Rahn,

Appellant

Randolph COUNTY

TRIAL JUDGE

HON.

J. F. GILLHAM



Term No. 18. In the Appellate Court, December 16, 1919
Fourth District.
March term, 1917.

| | | |
|-----------------------|---|-------------------------------|
| Henrietta Eannenberg, |) | |
| Appellee. |) | |
| vs. |) | Appeal from the Circuit Court |
| George Egan, |) | of Mendota County, Illinois. |
| Appellant. |) | |

McGrider, F. J.

Appel has recovered a judgment in the court below for seven hundred dollars, which the appellant seeks to reverse by this appeal.

The declaration in this case is in the usual form of trespass and charges George Egan, on the 23rd day of May, 1917, with force and arms, in the County aforesaid, assaulted the plaintiff and with great force and violence drove a certain motor vehicle or automobile against a lady in which the said plaintiff was then and there riding and by means whereof the plaintiff was then and there with great violence thrown from said lady to and upon the ground and injured.

The evidence in the case is quite conflicting. That of the appellee tends to show that the appellee lived about five miles south of Mendota, Illinois, and that she and her son Walter E. Egan, were on their way home and as they were traveling south and were out on a road the distance of about one mile they were overtaken by the appellant who was driving an automobile; that the appellant without any warning or signal drove his car on the left of appellee's lady and that appellee attempted to pull out but could not do so.

That the machine hit the front wheel of the buggy and turned it over in the ditch, threw the appellee and car out of the buggy and injured the appellee. The appellee claims that the machine struck the rear of the buggy wheel and so dented it that you could not get the top wheel. The appellee further claims that the road was not in a good condition. It further appears that the appellee said that the appellant did not stop his machine but drove on as though nothing had happened and that after reaching his home the son of appellee called up appellant by telephone and asked him if he knew what had happened and that the appellant replied that he did not give a damn what happened. It further appears that one of the wheels of the car of appellee was broken by reason of this accident and that the incurred considerable expense in endeavoring to get it fixed. It also appears that there was a buggy behind that of the one in which appellee was riding that was being driven by several ladies, and he says that as appellant was driving the car that appellant said, "I don't like you". He also says that the driver of the buggy in which appellee was riding attempted to pull out but the machine did not pull out and turned it over, and other witnesses of appellee tried to sustain this theory of the testimony. The appellant was not riding with him in his car, being alone as he had stated, all testified that the car did not hit the buggy, but that they passed by, and while they did not see the top of the buggy was turned over, as they did not see it, yet they all so say that the car never struck the buggy, and that they were not near enough to strike it. One of the witnesses testified that the car was not going very

1. The first part of the paper is devoted to the study of the

properties of the function $f(x)$ defined by the equation

$$f(x) = \int_0^x \frac{1}{1+t^2} dt$$

It is well known that this function is the arctangent function

$$f(x) = \arctan x$$

and that it satisfies the differential equation

$$f'(x) = \frac{1}{1+x^2}$$

which is a particular case of the more general equation

$$f'(x) = \frac{1}{1+x^2}$$

where α is a constant. The function $f(x)$ is called the

$$f(x) = \arctan x$$

function and it is denoted by $\arctan x$.

The function $f(x)$ is defined for all real values of x and

$$f(x) = \arctan x$$

it is an odd function, i.e. $f(-x) = -f(x)$.

The function $f(x)$ is also a periodic function with period π .

$$f(x) = \arctan x$$

The function $f(x)$ is also a continuous function and it is

$$f(x) = \arctan x$$

differentiable for all real values of x .

$$f(x) = \arctan x$$

The function $f(x)$ is also a bounded function and it is

$$f(x) = \arctan x$$

continuous at the origin.

$$f(x) = \arctan x$$

The function $f(x)$ is also a periodic function with period π .

$$f(x) = \arctan x$$

was still entitled to recover. The issue in this case was as to whether or not the appellant was injured by the use of force of arms as alleged in the declaration, and the instruction is not predicated upon this issue, but upon the issue of negligence, which is a separate issue. In *Smith v. Smith*, 130 App. 2d 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is said by counsel for the appellant that the instruction is simply a variance, if within, and that it is not a matter of advantage of on the trial, and that the instruction is not an instruction advising the jury that the appellant is not to recover in this case if the injury in which she was injured was not caused by the negligence of the defendant, but by the negligence of the appellant. It is said that the instruction is not a variance, but that it is a matter of advantage of on the trial, and that the instruction is not an instruction advising the jury that the appellant is not to recover in this case if the injury in which she was injured was not caused by the negligence of the defendant, but by the negligence of the appellant.

1. The first part of the problem is to find the value of x which satisfies the equation

$$x^2 + 2x - 3 = 0$$

2. The second part is to find the value of y which satisfies the equation

$$y^2 - 4y + 4 = 0$$

$$x^2 + 2x - 3 = 0$$

$$x^2 + 2x - 3 = 0$$

$$x^2 + 2x - 3 = 0$$

$$x^2 + 2x - 3 = 0$$

$$x^2 + 2x - 3 = 0$$

$$x^2 + 2x - 3 = 0$$

$$x^2 + 2x - 3 = 0$$

$$x^2 + 2x - 3 = 0$$

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he was trying to pass such lugs, it was the fault of the defendant. We do not regard this as negligence of either as a declaration upon one lugs; and it was the duty of the jury by the instructions of the court; and the instruction given by the court at the request of the defendant should be regarded as an effort to try the case upon the basis of negligence because it is a complete exoneration of the defendant with force and effect if the defendant accidentally struck up Alice's lugs.

It is also claimed by the defendant that the court in the first and second instructions placed the burden of proof on appellee assumed that there was a collision between the machine and the lugs, and we think that the instructions are subject to the criticism of the court in that respect. The evidence and theory of the defendant from the trial was that the machine never struck the lugs but the horse became scared and turned the lugs over, after the machine had passed them a distance of fifty feet or more. The evidence was quite satisfactory on that question and the instruction should have been given that the defendant should not have assumed that a collision had occurred.

There are other objections to it and we do not regard it as necessary to discuss them as there will have to be another trial in this case.

The case of the opinion then was reversed and the giving of the instructions as above stated was affirmed and the judgment of the lower court was reversed and the cause remanded.

not to be reported *in full*.

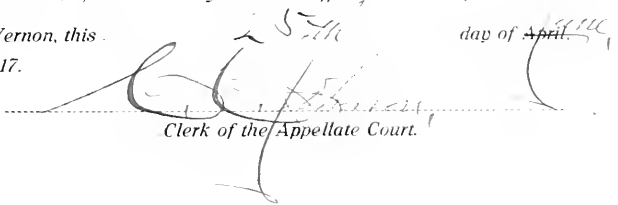
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

A. D. 1917.

day of April, 1917.


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ~~thirteenth~~ ^{Eighteenth} day of ~~April~~ ^{June} A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Gus P. Emmerich,

Appellee

vs.

No. 25
March Term, 1917
~~October Term, 1916.~~

Joliet Oil Tractor Co.,

Appellant

206 14, 113

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON.

LOUIS BERTRAND



20.74 2.0. 15.

In the Annual Court,

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[illegible]

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First - water.

C. 2116, 2117.

It was in the latter part of the month of October, 1940, that the optic nerve was severed with the so-called "chamberlain" or "chamberlain" method, a method of surgery for the removal of the optic nerve.

1961 the power distribution was 100 percent in the hands of the
industrial sector; in 1963 it was 100 percent in the hands of the
state. It is over 50 percent in the hands of the state where
the state is the only power source in the country in



front wheel and crawler sets in furrow machine tilts over on side. The purchaser refused to keep it and they are requested to have it work on the back the machine. Immediately upon receipt of this complaint the appellant sent its agent, George Irwin, to inspect the machine and find out what it was wrong with. The testimony of appellee's witnesses and of Irwin, the agent, is that the agent could not open the machine; that the machine would slip and that it failed to develop the power of the motor; that the three four-ten inch double-board plows were stuck at every turn over and that it did so with the agent and the agent started to appraise that there would have to be an extensive and an entire or different adjustment made and placed upon the machine to make it work and to make it to require the necessary repairs to make the machine work and that the repairs were not furnished. The appellee advised on October 4, 1931, for appellant to furnish the needed repairs and then instructed this suit to recover the money paid and the value of the notes that had been given to appellant. The appellant's testimony tends to show that if the machine was properly managed that it would do the work guaranteed; and Irwin tends to show that when the agent Irwin was at appellee's place that the machine did good work and that it needed no repairs.

The appellant has assigned several errors but we will only notice such as they have been assigned by counsel and will dispose of them in the manner suggested by appellant in his argument.

It is argued that no witness testified that when the tractor was properly adjusted it did not have

the power to do the work specified in the contract. The testimony of appellee and his witnesses is that it failed to work, that it lacked the power to draw the logs, that the wheels slipped and that the machine under reasonable conditions turned over. Also the defendant sent the man living there to test the machine under the proper condition for work to test it under work conditions and failed in his hands to develop the proper power over the wheels slipped and the machine turned over, even under his management. It is true that the machine was a new one that it worked properly and it failed and therefore the evidence of several witnesses who were present contradicts his statement and as this was a question of fact, we hold that the finding of the jury is conclusive.

It is next argued that the contract required that if the machine failed to work, no time should be given within three days and that the notice was not given until after the expiration of five days from the delivery of the machine. In other words, that the notice was not given in the time required by the contract. We do not regard this point as well taken for the reason that when the notice was given the defendant sent its agent to appellee's place to adjust the machine and try to make it do good work and this was a ^{vi}vi-
ver of the time of notice required by the contract.

It is next suggested that the delay in its return from Belleville reflected that the machine was broken righted and that it showed all right. We do not believe by Irwin to the defendant would, in our judgment, be in the nature of hearsay testimony and in effect, we would if such were competent there is sufficient evidence to show warranted









Some other matters have been suggested but not argued out by counsel and the trial has been waived.

[illegible]

Figure 1. Schematic representation of the experimental design. The subjects were divided into two groups: the control group (C) and the experimental group (E). The control group (C) was divided into two subgroups: the control group (C) and the control group (C). The experimental group (E) was divided into two subgroups: the experimental group (E) and the experimental group (E). The control group (C) was divided into two subgroups: the control group (C) and the control group (C). The experimental group (E) was divided into two subgroups: the experimental group (E) and the experimental group (E).

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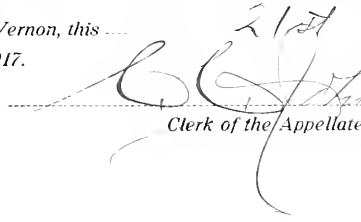
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

A. D. 1917.

21st day of April


Clerk of the Appellate Court.

NOIN

312

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

- Hon. James C. McBride, Presiding Justice.
- Hon. Franklin H. Boggs, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 425

Maggie Barnes, Admrx.,
Appellee

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 40
March Term, 1917
~~October Term, 1916.~~

Illinois Fuel Company,
Appellant

Randolph COUNTY

TRIAL JUDGE

HON. J. P. GILLHAM

Dec. No. 40. In the Appellate Court of the State of Illinois, Fourth Judicial District,
Jesse H. Hays, Plaintiff,
vs.
Illinois Coal Company, Defendant.

Appellate Court, Second District,
Jesse H. Hays, Plaintiff,
vs.
Illinois Coal Company, Defendant.

Dec. No. 40.

The Appellate Court rendered judgment in favor of plaintiff for \$500.00 on account of an injury received by her husband in defendant's mine, and costs accruing therefrom.

It appears from the record in the case that on October 7, 1913, the deceased Jesse Hays was employed at work in room number 38 off the south side of defendant's mine, and that there was a dangerous place in the roof of the room; that a piece of slate or bastard rock was loose, and that appellant failed to examine the room and work the same as dangerous when it should have been so, and appellant permitted the deceased to enter this room for work; it was in any manner advising him of the dangerous condition of the room the deceased, while at work in this room, under the directions of appellant, was injured by a fall of slate or rock from the roof of the room, which was not warned of or removed. The piece of rock or slate that fell upon the deceased was about 12 by 18 feet and 4 inches thick in places. The evidence tends to show that when the clod fell upon him that it

[illegible]

The negligence of applicant is not denied, but it is sought to recover the cost of two repairs; first, that the applicant was not liable because it was, as is provided by the Act, resulting from the use of a defective; and second, that the cost of the repairs was not recoverable because the injury received was not the killing itself.

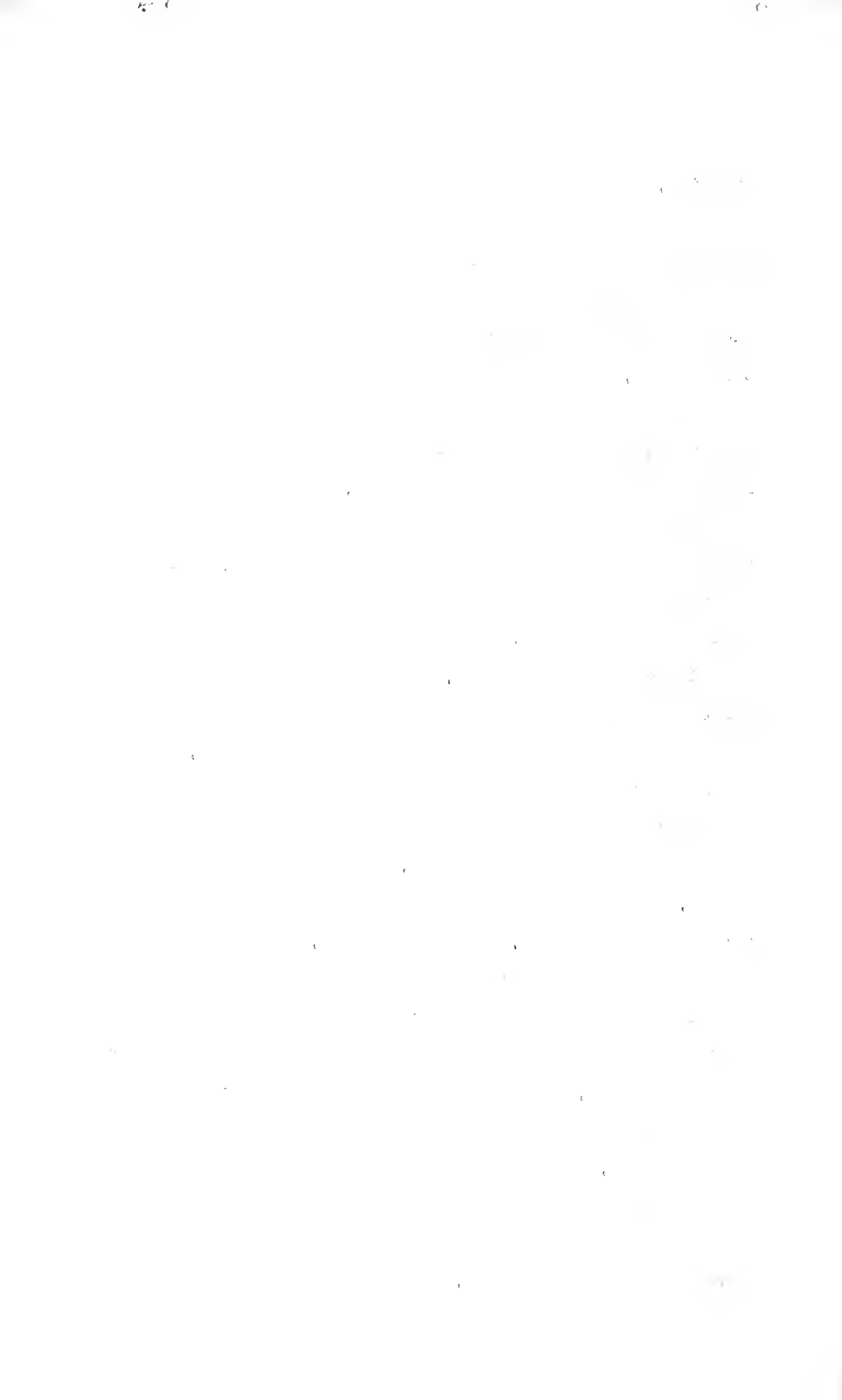
As this objective crystal, and the filament was operating under the same condition set, is not well taken. It



appears from the evidence that prior to the time of the injury, and on the first day of July, 1917, the appellant filed with the Industrial Board of the State of Illinois, a notice by which the appellant elected not to accept the provisions of the Compensation Act of this State, and a certified copy of such notice was introduced on the trial. It is insisted, however, by counsel for appellant that because the evidence of appellee failed to show that notice of such election was not posted in the mine, or notice thereof given to the miner, and, that the plaintiff has failed to make a case, and for that reason the case should have been taken from the consideration of the jury. This question has never, so far as we know, been raised upon by the Supreme Court of this State, but it has at several times been decided by this court. In the case of Hughes vs. Earl, on May 197, 1906, this question was carefully considered and determined against the contention of the appellant, and in the later cases decided by this court this decision has been followed, and we do not regard it as an open question in this court. It seems to us that it would be a policy of justice to permit the appellant to claim exemption from tort liability or common law liability, and seek to shield itself from liability because of a statute which the appellant has elected to maintain it has elected not to come under, and also has taken advantages of the present trial of defenses that it was not entitled to if operating under the compensation act, and if it were, in fact, operating its mine under the compensation act, it could easily have said so by appeal to the jurisdiction of the circuit court when the appellee sought to recover in this form of action. We are inclined to adhere to the former doctrine announced by this court upon this

question, and do not regard the objection as well taken.

It is next urged by appellant that the verdict should not recover in this case for the death of Thomas Barnes because such injury was not the proximate cause of the death. The appellant does not contend that it was not sufficient in this matter, but says that the plaintiff is required to show that the death of Thomas Barnes was occasioned by this injury. The question of the proximate cause of an injury is one largely to be determined by the jury, and unless the evidence is such that all reasonable persons would concur in saying that it was not the result of the injury, then it remained a question of fact and did not become a question of law. *Geary Adm'r. vs. Chicago Railway Co.*, 114 Ill. 442. *The Riazzi vs. Coal Company*, 102 Ill. 33. It appears from the evidence in this case that prior to the injury the deceased was a healthy man and capable of working every day, and that at the time he was injured a large log of wood or coal fell upon him; that his breast was bruised; his arm injured; his leg broken above the thigh; and, as some of the witnesses put it, he was "bruised all over"; that immediately after he was taken to his home, after the injury, he was washed and dressed and put to bed; his limb was set and he seemed to be suffering considerable pain; that in about five days thereafter he was attacked with pneumonia which lasted for about two weeks, and left him with a weak heart; that after the expiration of about three months his wounds were removed from the limb, but he was never able to get about without assistance; he never became strong, and a few days before his death he was examined by the doctor who said that his physical condition was below par, and that he was weak and in a



very low state of vitality; that shortly after his examination, and while he was sitting on the cot, died. "When he died he seems to suddenly hurt in chest, and he died quickly; he seemed to be no different that day."

It appears from the evidence that his heart became weak on account of the pneumonia, and that the pneumonia followed as a result of the injury, and the deceased having died so suddenly, it seems to us that the jury would be warranted in finding that the death resulted from a weakened heart resulting from pneumonia produced by the injury that the deceased received at appellant's mine, and that there was an unbroken chain of conditions extending from the death back to the injury making the injury the efficient cause of the death; at least, we are not able to say that there was manifest error in the jury so finding. It does not appear from this evidence that there was any intervening cause between the injury and the death that could not reasonably have been traced back to and connected with the original or efficient cause without which this death would not in all reasonable probabilities have happened as it did. "The proximate cause of an injury is that act or omission which it immediately causes, and without which the injury would not have happened, notwithstanding other conditions or omissions concurred therewith..... In the City of Joliet vs. Gould, 144 Ill 403, we deduced from the authorities the general doctrine that it was not a defense to an action for an injury occurring by reason of the negligent act of the defendant; that the negligence of a third person, or an inevitable accident, or an inanimate thing, contributed to cause the injury to the plaintiff if the negligence of the defendant was an efficient cause and without which the injury would not have



occurred." Miller vs. Kelly Coal Company, 139 Ill. 201.

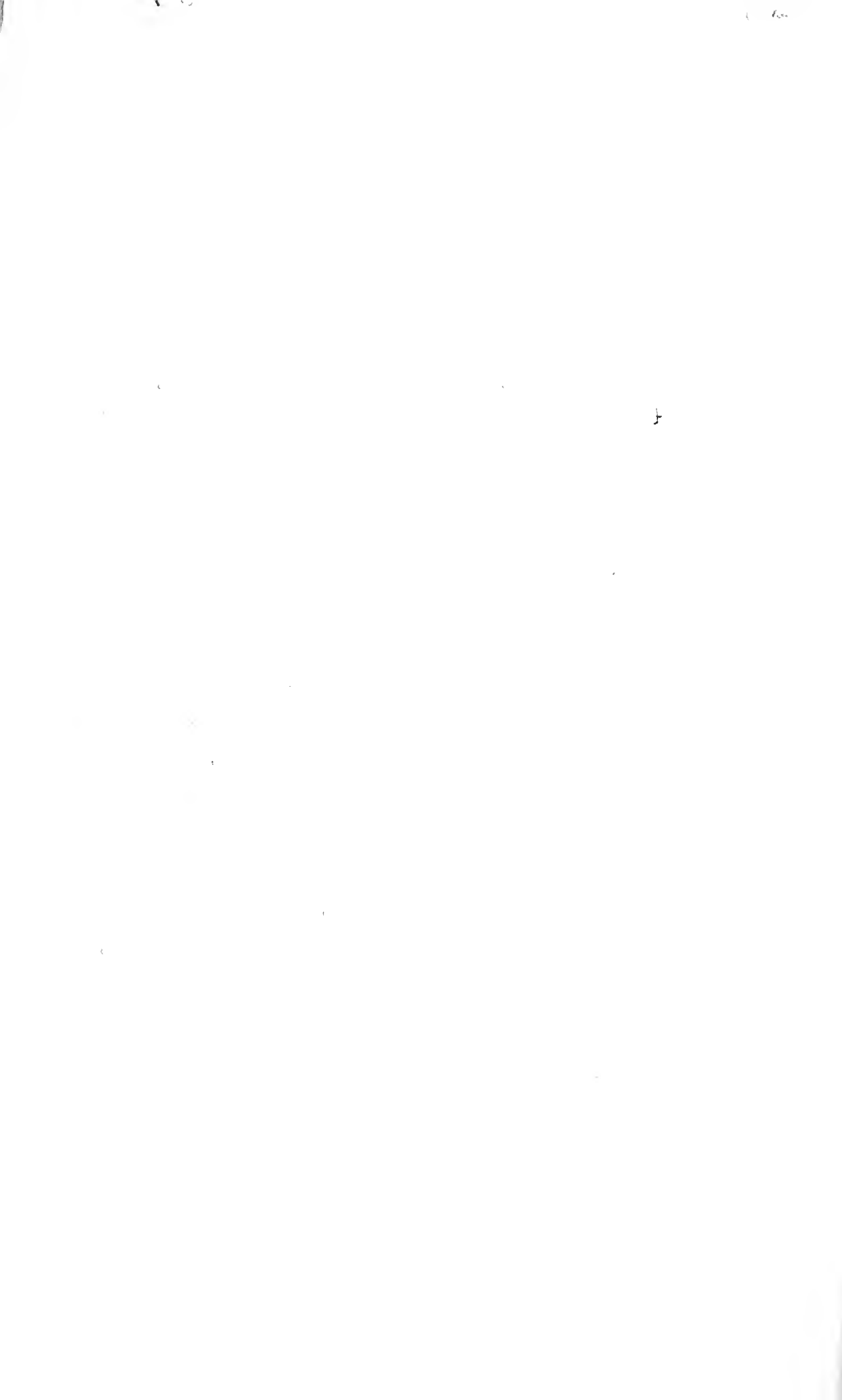
"The rule of common law is that an injury results from the negligent act of another, is not to be charged to the negligence of a third person, or an inanimate object, or some inanimate thing, also contributorily to cause the injury in the negligence charged against the wrongdoer was a sufficient cause, and without which the injury would not have occurred." Remond v. Kelly Coal Company, 139 Ill. 202.

Counsel for appellants quotes and argues extensively from the case of Faulk vs. Precision Company, 164 Ill. 387, but we do not regard this case as in any sense decisive of the question now under consideration. In that case the plaintiff sought to recover because his sister, Albertine, and a physician were put upon the stand and was allowed to testify that "the surrogates have no circulation and causes the destruction of the portion of the bowel beyond where the surrogates occur; the circulation will come to a want of nourishment, and death will result"; but the plaintiff also testified that his sister had become strangled upon a number of occasions; that she had received the treatment by doctors and had failed to get further relief from the treatment and had failed to get any relief from medical or other aid; and that it was impossible to recover for the possible death of the plaintiff, which the Court said could not be done, because it could not be shown that the consequences feared upon were necessarily certain to result, and that they were purely speculative. In the case under consideration the jury have found that the consequences have resulted, and therefore they are not speculative. Counsel also argues from the Faulk case that before the appellants

was liable for the death of Linda Turner, that it should have readily have foreseen and avoided this sequence. It is not enough that it is a foreseeable consequence. While it is a foreseeable consequence, it does not follow that it is a legal consequence. It is not enough that some one could have foreseen it, but not the particular injury, nor the particular death. In order to make a defendant liable for the injury, it is not necessary that the particular injury was a foreseeable result of its occurrence, but only that it was a foreseeable result of its occurrence. (See of Dixon v. [redacted], 141 Ill. 113, 115). If the consequences follow in an unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if at the time the defendant acted he knew or ought to have known that some injury might result in the death of Linda Turner. (See of Dixon v. Linda Company, 141 Ill. 113, 115).

One of the principles, as we have stated, that the law has recognized in holding that the consequences resulting in the death of Linda Turner followed in an unbroken sequence from the injury, and without any intervening efficient cause to approximate or cause the cause, and the judgment of the trial court is affirmed.

Not to be reported in full.

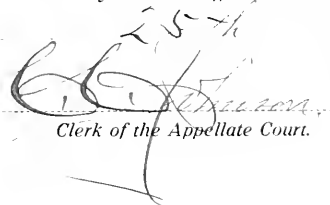


I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ...
A. D. 1917.

25th day of April, 1917


Clerk of the Appellate Court.

NOIN

337

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 452

Charles H. Greenwood et al,
Plaintiffs in Error

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 6
March Term, 1917
~~October Term, 1916.~~

Ben L. Maxey et al,
Defendants in Error

Clay COUNTY

TRIAL JUDGE

HON. J. C. MC BRIDE



March Term, 1917.

Plaintiff, et al.,

Defendants in error

v.

Plaintiff, et al.

Plaintiff, et al.,

Defendants in error

Opinion of Justice, et al.

--- 3 ---

When the money to the owner and publisher of the "Chicago Illinois Journal", newspaper published in the city of Chicago, (Way County). On January 1, 1916, he announced through the columns of his paper that he would institute and conduct a contest and give certain prizes to the subscriber securing within a specified period the greatest number of subscriptions to the paper, and that all contestants not receiving a prize were to receive a certain commission on the subscriptions obtained. The contest was conducted by Eugene J. Johnson & Company, who sent one of their agents to Chicago to act as "contest manager" while the same was being conducted. At the close of the contest the Chicago Journal was declared to have obtained the greatest number of subscriptions and was awarded and given the first prize, a cash prize of \$10,000.

At the September term, 1916, of the Circuit Court of Way County there was a suit brought by the Chicago Journal (now and hereinafter called "the Journal") against the Chicago Journal & Company, defendants in error and the other contestants. Afterwards the bill was filed by the Chicago Journal



at her request and she was made a defendant. The bill charges fraud and collusion on the part of said between Gray and Austin whereby Austin was awarded the said mobile, and alleged that Greenwood secured the most subscriptions and was in fact entitled to the same; that plaintiff in error, Maggie Lier, was entitled to one of the prizes and that certain persons, made parties defendant, were entitled to the other prizes. It sets forth in detail the acts constituting the alleged fraud and collusion, and charges that the judges who counted the final vote were deceived by the defendants in error. The prayer for relief contained in the bill is "that the said extended count and award so rendered against the said complainants may be set aside and vacated and that a new and larger award may be made in said cause, and that the respective prizes may be awarded to those persons lawfully entitled thereto, and that the cash payments offered in said contest may be decreed to be paid to those entitled thereto, and that the said defendant Gray may be ordered to deliver to the said contestants the prizes offered in said contest by the Southern Illinois Journal, and in the event of his failure so to do, that he be decreed to pay to the contestants for each of them the value of his said prizes in money, or that the defendants Genl. Gray and Charles Austin be decreed to pay to complainant and to each of them the value of the prize to which each is entitled, and that the court will grant unto complainants such other and further relief etc." On the hearing, the bill was dismissed for want of equity and complainants below have sued out a writ of error in this court.

The entire argument of plaintiff in error is devoted to a discussion of the sufficiency of the proof to establish

the fraud charged in the bill, but in our view of the case this question cannot be considered. The proof discloses that all the prizes had been delivered and that Norton had sold the automobile before the trial, so that any suit that could be set on in this case would be a matter of judgment. This is practically conceded by counsel for plaintiffs in error who say in their argument that "if the other lawyer should have had a decree in his favor for at least the value of one of those watches, which purported to be worth about \$400, and 'Gordon' should have a decree in his favor for at least the sum of \$275 which was that year the value of his automobile." There is no allegation in the bill, no proof was offered and no claim is made, of the negligence or delinquency in error. Under the facts as above detailed the question at once arises whether plaintiffs in error have selected the right form of action to obtain the relief sought by them. Plaintiffs in error ^{seem} ~~seem~~ rely upon the theory that when Nancy advertised the contest and they became contestants under the terms advertised, a contract was created between them and that this is not an action for damages but a bill seeking the performance of the contract. It may be said in answer to this that neither the bill nor the proof makes out a case for specific performance and neither shows grounds for such relief. From all that appears from the bill or the proof, plaintiffs in error can be fully compensated by damages for any wrong claimed to have been sustained by them and this satisfaction is all that is insisted upon by them in their argument. It goes to of equity do not sit for the purpose of enforcing bills, the only object of which is to secure damages, and equity



will not decree the specific performance of a contract which relates to responsibility where compensation in damages furnishes a complete and satisfactory remedy. *Wain v. 1881*, 205 Ill.326; *Anderson v. 1881* id. 3; *City v. Jacobs* 171 id.424; *Langston v. 1881* id.213.

It would appear that the judgment for damages in this suit would be at a more avail to the title in error than such a judgment at law and that their remedy is therefore in law and not in equity. It is stated in *Schmidt v. 1881*, 25 Ill.App.346, "The rule has been so often repeated as to have become a recognized legal maxim that a party can have no standing in a court of equity who has a plain and adequate remedy at law". As plain title in error had an adequate remedy at law for the relief sought by them they could have no standing in a court of equity and therefore the chancellor did not err in dismissing the bill for want of equity and the decree will be affirmed.

Affirmed.

Mr. Justice McBride having tried this case the Chancellor in the court below, took no part upon the hearing here.

Not to be reserved in full.

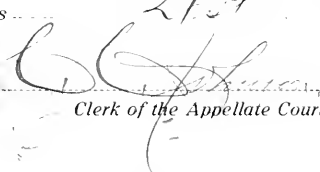
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

A. D. 1917.

21st day of June,


Clerk of the Appellate Court.

NOINI

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Chicago Warehouse & Silo Fixture
Company,

Plaintiff in Error

vs.

No. 12
March Term, 1917.
~~October Term, 1916~~

Highland Planing Mill & Lumber
Co., et al,

Defendants in Error

206 I.A. 458

ERROR TO
APPEAL FROM

Circuit

COURT

Madison

COUNTY

TRIAL JUDGE

HON.

J. F. GILLHAM



Term No. 12.

March 1917.

March Term, 1917.

Chicago Warehouse & Mill Lumber
Company,

Plaintiff in Error

v.

Highland Planing Mill & Lumber Company,

et al,

Defendants in Error

Opinion by Hughes, J.

---o---o---

This is an action of replevin commenced by Chicago Warehouse & Mill Lumber Company, to the October Term, 1916 of the Madison County Circuit Court, against Highland Planing Mill and Lumber Company and Hug Lumber & Construction Company.

The declaration consists of the common counts with which was filed an affidavit of recite. The defendant, each filed a plea of the general issue supported by an affidavit reciting that the suit and each count of the declaration is for goods claimed by plaintiff to have been sold to defendant and delivered to it pursuant to an alleged contract, whereas, in fact no such goods were ever sold or delivered by plaintiff to defendant, or received by defendant, but that said contract was rightfully and lawfully retained by defendant. A motion to strike defendants' plea and affidavits was denied by the court. A jury was waived and trial had before the court upon a written stipulation of facts. It appears from the stipulation filed, that the defendant in error, Highland Planing Mill & Lumber Company,



placed a written order with plaintiff in error, dated December 7, 1913, for five sets of slide fixtures, . . . to be shipped to Chicago, Illinois, to be delivered about August 1, 1916 at Highland, Illinois for a price of \$150.00. The terms of the contract defendant in error and the invoice accompanying the size of the fixtures therein contained at any time prior to shipping date and the contract or order also contained the following provision: "This written order constitutes the sole agreement between the parties hereto, and cannot be countermanded or altered except by mutual consent in writing."

Plaintiff in error acknowledged receipt of the order by letter dated December 15, 1913. On July 16, 1916 defendant in error, Hug Lumber & Construction Company, Successor to Highland Lumber Mill & Lumber Company, wrote plaintiff in error requesting that the order be cancelled. By letter dated July 18, 1916, plaintiff in error refused to cancel the order, and on July 17, this defendant in error again wrote asking that the order be cancelled, which plaintiff in error again refused to do by letter dated July 21. On or about August 1, the goods were shipped and reached the station at Highland. Defendant in error refused to accept them and so notified plaintiff in error by letter dated August 1, 1916. Other letters afterwards passed between the parties but the matter was not adjusted and this suit resulted. Judgment was rendered against plaintiff below for costs which it seeks to reverse by this writ of error. Various points of law were submitted to the court on the trial. All the objections presented by defendant in error were held by the court to be the law, and all but three of plaintiff in error's were refused.

The court held in substance that this by the terms

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of the contract neither party had the right to cancel or alter it without the consent of the other, yet the attempted revocation by defendant in error prevented plaintiff in error from making a valid delivery of the goods to the defendants in error by delivering the rice to a carrier in Chicago; that therefore plaintiff in error could not recover the full contract price under the common counts, but that its remedy should be by a special count for damages for a breach of the contract. The holding of the court is fully indicated by proposition No. 5 which was as follows: "The court holds the law to be that the provision in the order in evidence in this case that the same 'cannot be countermanded or altered except by mutual consent in writing', did not bar the defendant, Highland Planing Mill & Lumber Company or its successor, Hug Lumber & Construction Company, from thereafter repudiating the said order or contract; that the letters of the defendant, Hug Lumber & Construction Company of date July 12 and July 17, 1917, constituted such repudiation and that thereafter and while such repudiation was unrevoked, the only remedy of the plaintiff, if any, was by an action for a breach of the contract of purchase and sale." After judgment of the court was announced plaintiff in error asked leave to file such special count, which was denied.

Counsel for plaintiff in error contends the trial court erred in denying the motion to strike defendants' pleas and affidavits from the files, in refusing to hold as the law each of the propositions of law submitted by plaintiff in error, in holding as the law each of the propositions presented by defendants in error, in finding the issues for defendants in error and in refusing to permit plaintiff in



error to amend the declaration by adding the following sentence.

"The principal question to be determined is whether there can be a recovery of the contract price paid in this case under the common count, taking into consideration the attempted rescission of the contract. In an examination of the two letters written by said company in connection with the attempted rescission of the contract, the first letter, which was thought to be all they would be able to accomplish, succeeded "would kindly ask that you will cancel our order for the five sets of fixtures you have on file for future delivery." It is to be borne in mind that the order blank contained the agreement that it could not be countermanded or altered, except by mutual consent of the parties thereto in writing. The above letter appears to require the binding force of this provision of the order and the right of plaintiff in error to grant the request contained in the letter to cancel the order or not as it might see fit. That this was the view of the company on behalf of which the letter was written, is further shown by the fact that when plaintiff in error refused to cancel the order as requested, said company sent a further communication stating that they had two sets of fixtures still on hand, it found extremely difficult to dispose of and again asking said company, in view of that fact "to kindly cancel our order given you some time ago". The language of these letters does not appear to us to amount to a countermand or rescission of the order, but simply to an appeal to or request of plaintiff in error to permit said company to abandon its order in view of the



fact that it had silo fixtures on hand from the previous year, which it was unable to sell. This consent was never given by plaintiff in error, which insisted upon standing by the terms of the contract and therefore the contract was never legally rescinded.

It is true as claimed by defendants in error that there is a line of authorities in this state which hold that if a buyer refuses to accept goods according to his contract, the seller cannot recover the purchase price as such, upon the common counts but must recover if at all upon counts alleging damages for a breach of the contract in refusing to accept the goods when tendered, but these same authorities also hold that when the contract has been fully performed and nothing remains to be done but the payment of the money, the common counts are applicable. *Brand v. Henderson*, 107 Ill. 141; *Troop v. Sherwood*, 4 Ill. 92; *Burham v. Roberts*, 72 Ill. 192. The opinions in the cases relied upon by defendants in error, seem to be based on the fact that there was no delivery of the articles sold to the purchaser, and it is evident that where there is no delivery, there is no performance of the contract by the seller. But in this case there having been no rescission of the contract as we have above held, then by the terms thereof, a delivery to the carrier in Chicago was a delivery to the company giving the order or its successor. *Carthage v. Duval*, 92 Ill. 234; *Earl v. Earl*, 111 Ill. 401; *Waukegan Lumber Co. v. Waukegan Lumber Co.*, 125 Ill. App. 341. Defendants in error cite various portions of the "Uniform Sales Act" as sustaining the view of the law taken by the trial court, as indicated by the propositions of law submitted by them and held by the court to be correct statements of the law, as of li-

cable to this case. That act, however, was not intended to supplant a written contract between the parties, a sale nor to abrogate its terms, and notwithstanding it, parties have the right to make such terms by their contracts concerning the delivery of goods, as they may desire. The contract in question under consideration, here, expressly, provided that it could not be countermanded except by mutual consent in writing. This consent was not given and the Uniform Sales Act does not, under such circumstances, supply it. There was a delivery of the goods in this case, and nothing remained to be done to complete the contract on the part of the seller and nothing remained to be done on the part of the purchaser, but the payment of the money, ^{which} in our opinion a recovery of the purchase price could properly be had on the common counts and the trial court erred in holding, as the law, that a recovery could not be had under such counts.

We are also of opinion that had a special count been necessary to entitle plaintiff in error to recover, that the court should have granted leave to it to file such special count, even though it was not offered until after the court had announced the finding of the issues in favor of defendants in error. For the reasons above given the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

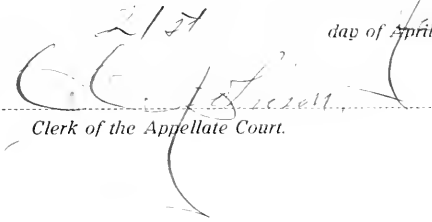


I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ..
A. D. 1917.

21/27 day of April, 1917


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Stephen D. Sexton,

Pltf. in Error

vs.

No. 17
March Term, 1917
~~October Term, 1916.~~

Michael Harrold,

Deft. in Error

206 I.A. 460

ERROR TO
~~APPEAL FROM~~

Circuit

COURT

St. Clair

COUNTY

TRIAL JUDGE

HON.

LOUIS BERNREUTER

March Term, 1917.

Stephen W. Norton,)
 Plaintiff in error)
 v.)
 Michael Harold,)
 Defendant in error)

Opinion by Judge, J.

--- 3 ---

There was an action of assumpsit brought to the April term, 1916 of the circuit court of St. Clair county by Stephen W. Norton, to recover from Michael Harold, the sum of \$750 as commissions claimed to be due him for the sale of 20 shares of stock owned by the latter.

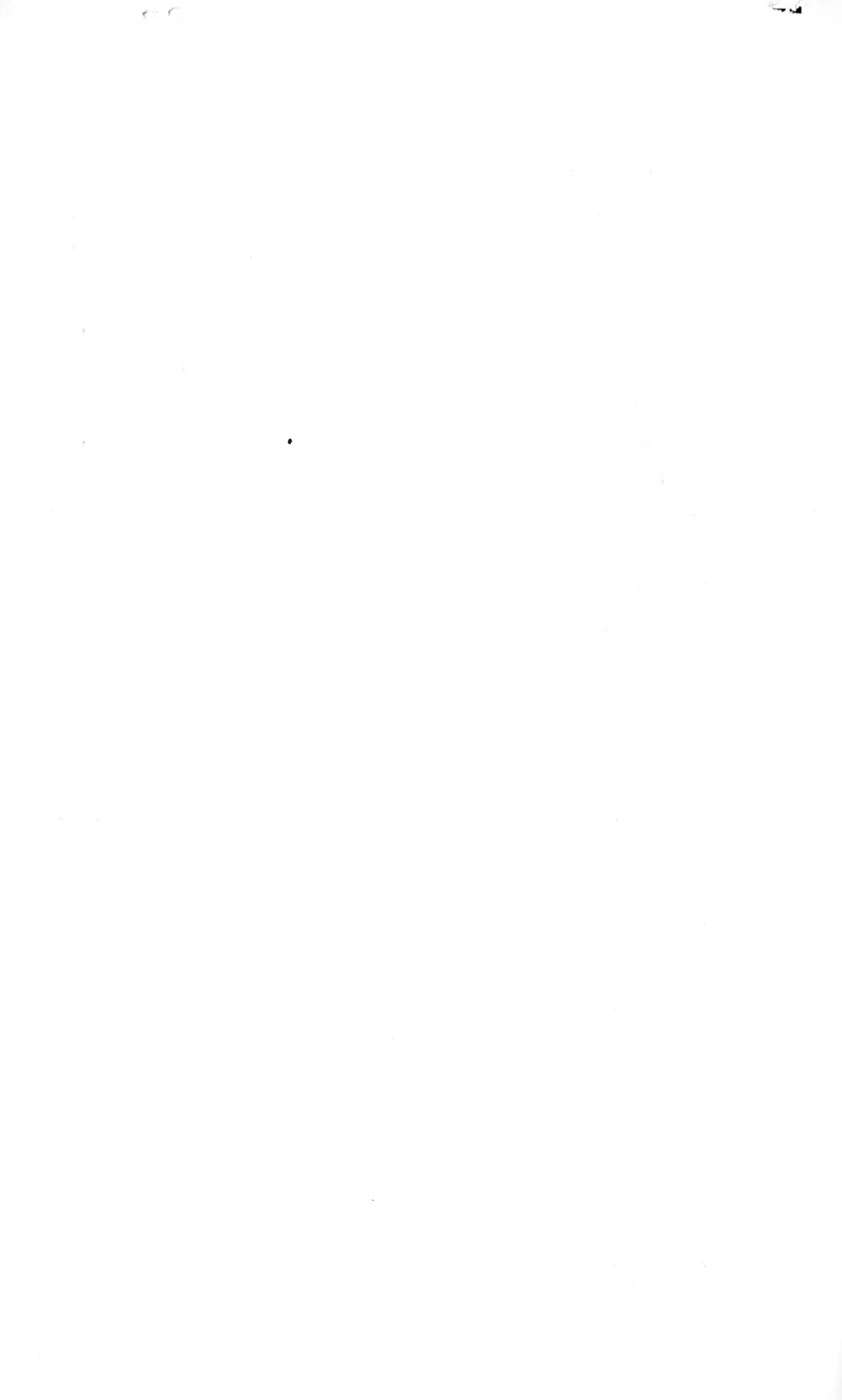
The declaration consisted of one special count and the common counts consolidated. The special count alleged in substance that on the 1st day of January, 1916, defendant owned 20 shares of the capital stock of the American Corporation, an Illinois corporation, and being desirous of selling same procured plaintiff to make a sale thereof for him and promised to pay plaintiff whatever his services in that behalf were reasonably worth; that on or about January 1, 1916, plaintiff sold such stock to the American Corporation for \$6,000; that his services in that respect were reasonably worth \$750 and that defendant was indebted to him in that amount. The case was tried before a jury and resulted in a verdict for the defendant. After overruling a motion for a new trial,



the court entered judgment in favor of plaintiff over costs, to reverse which this writ of error was prosecuted by him.

Counsel for plaintiff in error alleged that the verdict is contrary to the evidence. It appears from the proofs that the capital stock of the Standard Lumber Company consisted of 400 shares of the par value of \$100 each, owned as follows: defendant in error 100 shares, Sam Sullivan 14 shares, Frank L. Norman 50 shares and plaintiff in error 10 shares. Considerable friction had arisen between defendant in error and Sam Sullivan, and plaintiff in error in an endeavor to bring about an adjustment of the trouble, wrote a letter on January 1, 1911, advising a sale of Sullivan to defendant in error and Sullivan. Defendant in error made no reply to this letter, but Sullivan replied offering to buy defendant in error's stock for \$30. per share or to sell his own for that price. Nothing came of this effort on the part of plaintiff in error and he made no further attempt to settle the trouble. Plaintiff in error who was the only witness in his camp, testified that on January 18 or 19, 1911, defendant in error came to his office and in the presence of two of his employees engaged him to sell his stock; that in pursuance of such employment he arranged for a meeting of defendant in error and Frank L. Norman, at which the sale was consummated, and that at the same time he sold his stock to Norman at the same price. This employment was denied by defendant in error, who claimed that whatever plaintiff in error did in the matter he did of his own motion with a desire to settle the trouble among the stockholders. Neither of defendant in error's two employees was produced as a witness. Defendant in error produced as a witness, Frank L. Norman, who testified that while





purely voluntary, were properly admitted.

The trial court gave seven instructions in which it charged the defendant in error, five of them being on the question of the admissibility of evidence. All of these instructions except one were correct, the one charging the defendant in error insists it was error for the court to give so many instructions on this one point. It is not good practice to give so many instructions on this one question, yet it was not material error to do so. The verdict is supported by the evidence and no prejudicial error appears on the record. The judgment will therefore be affirmed.

Affirmed.

It is so ordered in law.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ..
A. D. 1917.

25th
day of April,
Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Harriet Gilmore,

Appellee

vs.

No. 20
March Term, 1917.
~~October Term, 1916.~~

Sylvester Killion, et al,

Appellants

206 I.A. 461

ERROR TO
APPEAL FROM

Circuit

COURT

Marion

COUNTY

TRIAL JUDGE

HON.

THOMAS H. JETT





of, he shot and killed the said Lennie Wilson. The first count charged that the plaintiff was injured in her property and means of support and the second that she was injured in her means of support. At the close of the evidence the court instructed the jury to find the defendants not guilty, except whatever illness, injury, pain, or suffering, after death and those matters, and the defendants were. On the third day the jury returned a verdict at 11:00 a.m. for which the court rendered judgment, and on overruling a motion for a new trial. The case came before this court on appeal by the defendants below, from that judgment.

The evidence shows that said Lennie Wilson in the state of Illinois and that she is possessed of 70 acres of land which she declares is not sufficient to support herself and husband, who is unable to work. Counsel for appellants contend that in order for appellee to recover in this case, her son being an adult, it was incumbent upon her to prove by a preponderance of the evidence that she was a resident of the state of Illinois, and also a poor person, so that she would come within the provisions of the Wagner Act of the state of Illinois, and that her son was financially able to support and maintain her; that she must show that she had a legal right to be supported by her son; that voluntary contributions to her support by her son would not be sufficient to entitle her to recover under the statute. Our attention is called by the opinion in Jury v. Green, 86 Ill. App. 110, which was a suit under this statute by a daughter for damages to her person and means of support occasioned by the intoxication of her father, where it was held that the means of support referred to in the statute

are such as the person intoxicated would be legally bound to furnish, and that the daughter could not recover, but that case does not appear to have been cited or followed in cases of this nature, so far as we have been able to discover. In the case of *Barlow v. City of New York*, a suit brought by Lottie Willard, mother, to recover damages under this statute caused by the selling and giving of intoxicating liquors to her adult son resulting in his actual intoxication and housewreck and also in violation of the statutory duty of supporting him, in a certain case of which duty she expended her own time and property, our supreme court, in a finding of judgment for \$1000, in favor of appellee said, "It is conceded that the statute is broad enough to include a child and parent but the question is that the right of action is only in favor of the one who, under the facts and circumstances as they exist at the time, has a legal right in actual enjoyment, which has been injured in consequence of the intoxication. The proposition as stated is, that this action will not lie because the son, Robert L. Willard, has no right to bring a suit to enforce the enjoyment of his right to support by his mother. If the argument were sound it could not be applied to this suit, which was brought by the mother for damages resulting from the performance of her duty. She, and not the son, was the ^{person} injured, and the injury resulted from imposing upon her the performance of a duty which otherwise would not have existed. If she performed her statutory duty, the question whether her son would have a right of action against her is not raised and failed to perform it is immaterial. Even assuming the situation, a wife living with her husband, or a child, cannot bring a suit

against the husband or father for a failure to furnish proper support, but it would not be thought that such wife or child could recover on such a basis if the statute

was construed to require support, 177 N.E.2d 1, was a ruling in line with the principle that a husband's support caused by the failure of his brother-in-law. The opinion of the court in this case contains the following language, "The statute places upon a person the duty to support his wife or child, and it is not necessary to show that the failure to support is in consequence of the intoxication of any person, except the person causing such intoxication. It is not necessary to show that the person causing such intoxication is the person who is injured should be liable for such an injury in relation to the intoxicated person. The person who is injured of the kind mentioned, whether directly by the act of an intoxicated person or indirectly is consequence of the intoxication may maintain an action. (Higley v. Higley, 111 N.E.2d 111, 112) The appellee was, in fact, dependent upon his brother for support. He was dependent upon him for his support and was unable to earn a livelihood. Under the facts stated above and by the record, the statute (Rev. Statute 111-117) is read upon her brother the duty to support her. (People v. Higley, 111 N.E.2d 111, 112; Higley v. Higley, 111 N.E.2d 111, 112) It was a legal right which appellee could have enforced upon her brother or not. It was a legal liability which the brother owed upon him and provided he is her brother, which she was receiving the benefit, and the failure to support is in consequence of his intoxication. The plaintiff has a cause of action for such deprivation." This is also in *Wool v. Wellingtonstein*, 244 N.E.2d 131, 132, the same court held, "The fact the wife may

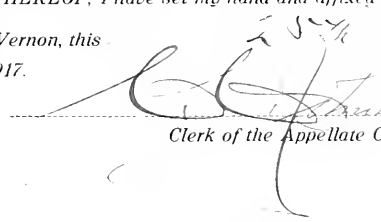


I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

day of ^{15th} ~~April~~, 1917


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

George Lirkovich,

Appellee

vs.

No. 23
March Term, 1917
~~October Term, 1916~~

Lazo Maravich,

Appellant

206 I.A. 463

~~ERROR TO~~
APPEAL FROM

City

COURT

East St. Louis

COUNTY

TRIAL JUDGE

HON.

H. L. BROWNING



Term No. 23.

March Term, 1907.

George Sirkovich,

Appellee

v.

Lazo Barovich,

Appellant

Appeal from City Court, St. Louis.

Opinion by H. Bee, J.

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On December 3, 1906, my client Lazo Barovich, sold to George Sirkovich, for a consideration of \$13,000 his saloon business at 1514 Kansas Avenue in the city of St. Louis, Illinois and in the written contract of sale agreed not to engage in the saloon business within five blocks of 1514 Kansas Avenue for three years.

This is an action in assumpsit by appellee against appellant to recover damages for a breach of that part of the contract by which appellant agreed that he would not re-engage in the saloon business within the limits of five blocks above mentioned. There was a verdict and judgment for plaintiff for \$1300, from which the defendant prosecutes this appeal. Both parties are foreigners and the saloon business sold was located in a neighborhood frequented by persons of their nationality. About a month after the sale a saloon was opened at 1514 Division Avenue, ostensibly by my client's brother, with my client in charge. The evidence shows this place to be sit in five blocks of 1514 Kansas Avenue, and the jury was amply warranted in believing that the saloon was in reality owned by appellant. He claimed to



have bought out his brother before the trial, and it was shown that at the time of the trial he was again in the saloon business at 2101 Kansas Avenue.

It is urged by counsel for appellant that there is no basis in the evidence for the amount of the verdict returned unless speculative profits can be based on the basis of a verdict in a case like this. The jury found a material and substantial breach of the contract, and the only question is as to the amount of the damages. The object of the contract was to secure the saloon business at 2101 Kansas Avenue against a loss of business and consequent profit which might result from a competitive business conducted by an agent within five blocks of that place. For a violation of this covenant, appellee may recover for loss of profits and diminution in the value of the business. *Leuwens v. Goetzke*, 107 Ill.App. 503. These damages were difficult to prove under the circumstances of this particular case and the proof of damages is not entirely satisfactory as to amount. It appears, however, that appellee offered the best proof available under the existing conditions. He testified he lost \$2,000 and after the saloon at 1818 Division Avenue was opened and lost \$200 cash. He was compelled to close his doors in about eight weeks. There is proof in the record tending to show that his loss of business was occasioned by the opening of the saloon by appellant in violation of the main terms of his contract and the jury was warranted in fixing the damages in the amount of the verdict.

The refusal of the trial court to give defendant's instruction No. 1 is assigned and argued as error. This instruction informed the jury that before plaintiff could

recover, he must prove among other things that his business had been damaged as a consequence of the breach of the contract. The execution and validity of the contract are not disputed, a breach thereof was clearly shown and the plaintiff was entitled to recover at least nominal damages without any proof of actual damages. *Edy v. Condit*, 189 Ill. 277; *Brandt v. Gallup*, 111 Ill. 498. This instruction did not state the law correctly and it was not error to refuse it.

Appellant urges as error the giving of appellant's instructions one and two which informed the jury that if they believed from a preponderance of the evidence the contract was executed and that defendant had violated the same, their verdict should be for the plaintiff. These instructions stated correct principles of law and the instructions in the case when considered as a whole correctly informed the jury as to the measure of damages. It was not necessary for each instruction to state the measure of damages. The verdict was warranted by the evidence, no material error appears on the record and substantial justice seems to have been done. The judgment of the trial court is therefore affirmed.

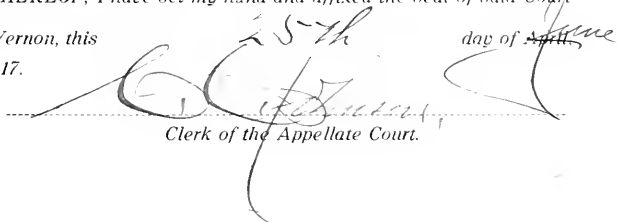
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

15th day of June,

Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

W. G. Markman,

Appellee

vs.

No. 24

March Term, 1917
~~October Term, 1916.~~

O. L. Hallbeck et al,

Appellants

206 I.A. 465

ERROR TO
APPEAL FROM

Circuit

COURT

Edwards

COUNTY

TRIAL JUDGE

HON.

J. C. KERN



March Term, 1927.

| | | |
|------------------------|---|----------------------|
| J. G. Barkman, |) | |
| Appellee |) | |
| v. |) | Appeal from 1st div. |
| G. S. Hallbeck, et al, |) | |
| Appellants. |) | |

Opinion by Higbee, J.

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This was an action brought before a justice of the peace by appellee, J. G. Barkman, against appellants, G. S. Hallbeck and J. L. Hallbeck, partners under the firm name of Hallbeck and Son engaged in the retail implement and machinery business, at East Salem, Illinois. The suit was to recover damages for the alleged breach of a warranty in the sale of a gasoline engine by appellants to appellee. The trial, on an appeal to the circuit court of Grundy county, resulted in a verdict for appellee in the sum of \$96.67. By this appeal appellants seek to reverse the judgment entered on this verdict.

The questions of whether there was a warranty of the engine, and if so, whether the engine fulfilled that warrant, were questions of fact to be determined by the jury. By returning a verdict for the plaintiff the jury decided both these questions in the affirmative. Appellee testified J. L. Hallbeck told him the engine was just as good as a new one, had been used only two weeks, was in first class condition and would do the work for which appellee

wanted it. Hallack admitted he told appellee the engine would do the work and take care of the business he was buying it for and serve him as good as a new one from the factory. It is admitted also by appellants that they knew appellee wanted the engine to use in lighting his jewelry store, and that the water jacket on the engine was cracked when it was sold, and did not ~~xxx~~ inform appellee of that fact. The evidence shows that appellee had trouble with the engine. Appellants contend, however, this was due to the fact appellee did not know how to run the engine, and there is some evidence tending to support this contention. There is also evidence tending to show that the engine did work well before sale, and after it was returned to appellants, and that the crack in the water jacket did not materially affect the working of the engine. The jury saw and heard the witnesses testify, and there was sufficient proof to warrant the finding there was an express warranty and that the engine failed to fulfill that warranty. Under the well and long established rule that the verdict of the jury should not be disturbed unless clearly against the weight of the evidence, that finding should not be set aside.

Counsel for appellants assign as error the giving of all but one of the eight instructions given for appellee. These instructions were not carefully drawn and contained minor inaccuracies but when considered as a whole and treated as a series they do not contain such error as would warrant a reversal. Complaint is also made of the court's action in refusing to give appellants' eighth instruction. This instruction informed the jury, among other

things, that in the sale of second hand goods no warranty is implied. There was no contention in this case of any implied warranty, and no clients were taken in their request. It is possible moreover that second hand goods may be sold under such circumstances as to raise an implied warranty, such for instance as the sale of goods for a particular purpose. It was not error to refuse this instruction.

Appellants also urge an error and omission over their objection, of the testimony of appellee, that ... Lillbeck agreed not to sell the motor when in regard for the engine. While this evidence in no way tended to prove a warranty or breach thereof, yet it was a part of the transaction and the admission of the same was not material error. The question asked appellee as to whether a client didn't say at the end of two weeks "that the engine was in good condition," was leading, but the information sought to be elicited was proper and the form of the question was not so material as to amount to reversible error.

The verdict is not against the weight of the evidence, no material error appears on the record and the judgment should accordingly be affirmed.

Affirmed.

Not to be reported in full.

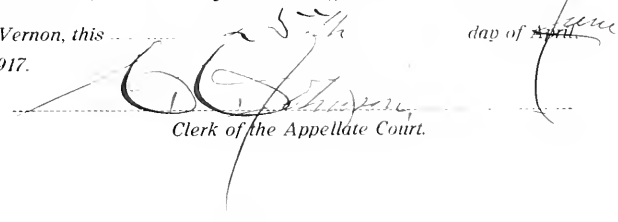
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 5th

day of April

A. D. 1917.


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

George A. McHatton,

Appellee

vs.

No. 36
March Term, 1917
~~October Term, 1916~~

Alton, Granite & St. Louis Traction
Co., Appellant

206 I.A. 474

ERROR TO
APPEAL FROM

City

COURT

Alton

COUNTY

TRIAL JUDGE

HON. JAMES E. DUNNEGAN



March 17, 1937.

James A. Clatten,

Plaintiff

v.

Alton, Granite & Lumber

Traction Company,

Defendant

Verdict by Jury, 1.

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This was an action on the part of James A. Clatten, in the city court of the city of Alton, to recover from Alton, Granite & Lumber Traction Company, damages on account of personal injuries. The declaration consisted of one count and alleged in substance that defendant was the owner of and operated a line of street cars in the city of Alton; that defendant was a passenger on one of its cars July 20, 1936, on Washington street, to be carried to or near the intersection of Washington and Main streets; that it was the duty of defendant to keep and cause the car to remain stationary a moment of time to enable plaintiff to alight therefrom safely; that defendant did not regard such duty, but held plaintiff in the exercise of due care and diligence as a passenger; that defendant negligently caused the car to start moving and violently started, whereby plaintiff was thrown from the car with great violence and sustained severe injuries. The plea of general issue was filed and was also filed before



jury. A verdict for \$5000 was returned and the traction company has appealed to this court.

Appellee contended on the trial that the car was started just as she was stepping from the rear platform to the lower step. Appellant insisted she did not see or attempt to alight until after the car was started. This was the principal fact controverted on the trial. Five witnesses testified in behalf of appellee including his son and himself, as to the circumstances of the accident and four, including the conductor and stationer, testified in that respect for appellant. Counsel for appellant have a considerable part of their brief and argument to their contention that the verdict is contrary to the evidence. The evidence is somewhat contradictory on some of the controverted facts, but the verdict should not be disturbed where the record discloses no error.

Two instructions were given in behalf of appellee and nineteen in behalf of appellant. The trial court's refusal to give the following instruction offered by appellant is assigned as error: "You are instructed that the declaration does not charge, as a ground of recovery, that the defendant did not keep its car waiting at each street a sufficient length of time for plaintiff to get off of such car, but that the actionable negligence charged is the sudden and violent starting of the car throwing plaintiff therefrom. You are further instructed that unless such actionable negligence is proven as charged your verdict must be not guilty." This instruction contains nothing so error that is not fully covered by other instructions given for appellant. The change in the declaration appears to be as much a charge of failure to wait a reasonable time, as a charge of negli-



gence in starting. If the car started while appellee in the exercise of due care was alighting therefrom, it necessarily failed to wait a reasonable time.

The second instruction given for appellee reads as follows: "The court instructs you as a matter of law, that where two witnesses testify directly opposite to each other on a material point and are the only ones that testify directly to the same point you are not bound to consider the evidence evenly balanced or the point not proved; you may regard all the surrounding facts and circumstances proved on the trial, and give credence to the one witness over the other, if you think such facts and circumstances warrant it." The giving of this instruction is assigned as error. While this instruction is somewhat argumentative and is not to be wholly unadvised, yet it does not contain reversible error.

The assignment of error upon appellee's first given instruction presents a more serious question. It is as follows: "This court instructs the jury that the defendant street car company is responsible to passengers for the wrongful acts of its servants and agents while employed in running their cars, when such wrongful acts are committed in connection with the operation of its cars, and if you believe from all the evidence in this case that the defendant street car company stopped its car at or near the corner of Washington and Union streets and then suddenly started the same, while plaintiff was in the act of alighting therefrom, and thereby caused the plaintiff to be thrown from the car and injured, if you believe from the evidence that the plaintiff was in the exercise of all due care and caution for his own safety at the time, then your verdict will be





plaintiff to allow such damages as they believed from the evidence she was entitled to' and no there still it should have been such damages as she had suffered, and not have given to the jury the wide latitude of allowing for such damages as they might deem she was entitled to'.

Under the foregoing authorities this instruction is clearly erroneous and no other instruction given on either side covered the same subject or cured the error here contained. Appellant assigns an error and contends in its argument that the verdict was excessive and under the evidence this contention is not without merit. It would therefore appear that the error in the instruction concerning the assessment of damages may have been particularly injurious to appellant as the jury were not thereby confined to the damages sustained by appellee in determining the amount to be allowed, but were given liberty to give a verdict for such an amount as they believed from the evidence appellee was "entitled to recover".

For the error contained in instruction number one given for appellee the judgment will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.




I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

25th day of April 1917


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Richland Lilling Co.,

Appellant

vs.

No. 45

March Term, 1917
~~October Term, 1916.~~

Lane Bros. & Erwin,

Appellees

306 I.A. 426

ERROR TO
APPEAL FROM

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. N. O. POTTER

March 1917.

10.5 of 111.1, or any, /
 111.1 /
 v. /
 111.1, or any, /
 111.1, or any, /
 111.1, or any, /

111.1, or any, /

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Appellant, Highland Milling Company, a corporation, brought suit before a justice of the peace against the defendant, John Lane and Mill Grain, trading as the Lane Grain Company, appellees, for \$4.01 for a bill of lading, furnished the latter by the Milling Company. In the circuit court to which the case was appealed, it was stipulated between the parties, that the claim of appellant is substantially correct; that appellees bought the goods indicated by the bill attached to the claim and that the prices charged were reasonable; that appellant is entitled to be required to prove the price of its bill but that the case depended entirely upon the defense of set off or payment. There was also filed in the circuit court, a bill of set off by appellees, claiming pay for 3715 yards of dirt loaded by them at 17 1/2 cents per yard, amounting to \$64.91, out of which they offered to pay appellant the amount due it upon its bill.

Appellees' claim of set off was said to have been based on a contract for loading for a switch and placing

drain pipe, signed by John B. West, the respondent and appellant. Appellant claims to have paid the respondent all it owed for the work done, amounting to \$100.00, and it appears that the claim was made during the trial about the construction, until it was filed as a claim in the suit in the circuit court. The trial resulted in a verdict for the respondent in favor of the appellees and for that amount judgment was entered by the circuit court.

Appellees have filed an appeal and for this reason the judgment will be reversed and the cause remanded pro forma, in accordance with rule 57 of this court. The court is hereby inclined to enforce this rule for the reason that it does not appear from the record how the jury, under the proofs, could have arrived at a verdict in favor of the appellees for the amount named, also because this suit is against Lane Bros. & Co. while the claim for set-off is based upon a contract with and work done by John B. West and Lane Bros. & Co., and it does not appear from the proofs why a set-off, claimed to be due appellees and West, could be allowed against appellant in favor of appellees Lane.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

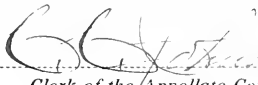
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ..

20th

day of April.

A. D. 1917.



Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Nineteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

People ex rel Bothman et al,

Appellees

vs.

No. 46
March Term, 1917
~~October Term 1916~~

The Title Guaranty & Surety Co.,

Appellant

Impleaded with J. W. Brown

206 I.A. 477

ERROR TO:
APPEAL FROM

Circuit

COURT

Jackson

COUNTY

TRIAL JUDGE

HON.

CHARLES P. MILLER

March Term, 1917.

The people of the State of Illinois
for the use of Mary Bethune, et al
Appellees

v.

10/10/11 10:10 AM

The Little Surety & Surety Company,
Appellant

loaded with James . Brown.

Opinion by Hughes, J.

— 000 —

This case was heretofore before this court upon a special from the judgment of the trial court sustaining the demurrer of defendant to the declaration, which was held to be erroneous, the judgment being reversed and the case remanded with directions to overrule the demurrer. The People v. Brown, 194 Ill.App.246. The facts of the case set forth in the declaration, are fully stated in that opinion. Upon the remanding order in that case being filed in the circuit court of Jackson county, defendant James Brown, filed two and defendant, The Title Guaranty Surety Company filed eleven special pleas to the declaration. Of these pleas plaintiff filed general demurrer, which was sustained by the court and defendants elected to plead by their pleas. Judgment was entered against defendant in the sum of \$500.00 and \$500.00 damages. From said judgment, The Title Guaranty Surety Company filed a motion.

The eleven special class files by Plaintiff

in substance that the said James L. Brown issued the warrants involved without any authority from the county board of Jackson county; that at the time of the issuance of said county orders the county of Jackson was not indebted to him and the same were illegal; that he negotiated and sold them to usees as a private individual and not as county clerk; that such warrants were not negotiable and usees bought them for speculative purposes; that the sale and negotiation of them to usees were not official acts; that the loss of usees if any was not the direct and proximate result of the issuance of such warrants but was the direct and proximate result of the subsequent act of said Brown as a private individual in selling and transferring said warrants to them for a large discount and for speculative purposes and for their individual gains and profits; that there is no joint right of action in usees; that appellant was only legally obligated for the faithful discharge of the official duty of said Brown as such clerk and that the acts here complained of were "beyond the scope, power and authority" of such clerk; that such warrants were not signed by the treasurer of Jackson county; that the county had not paid any of them; that they created no liability against the county; that said Brown did not violate any of the conditions of his bond as county clerk and that usees by purchasing them acquired no right of action against the county.

In the former opinion of this court in this case, it was said, "Counsel for appellee (appellant here) in stating their position say: 'We contend that the declaration in this case does not state a good cause of action, because ~~at~~ the sale of the warrants to the usees was not an official act, but was the clerk's own private speculation and transaction

which was no part of its official duty, and therefore it did not require him to do in the performance of its official duty, and therefore his liability is not limited. Counsel for appellee further state that it appears the warrants have not been paid and the county not damaged, and lost nothing by reason of the negotiations of these orders; that: 'This is an important and material matter to be kept in mind throughout this argument'. It is the contention of appellee that the declaration does not state a cause of action: first, because the county has lost nothing by the transaction and that the county does not protect these individuals even if they were injured in these particular transactions; second, that the acts of the clerk, at least that of selling and assigning, the warrants, was not an official act, and 'the thing that caused the injury, if one has been sustained, to the decree, was not the issuance of the warrants but the transfer or sale of them by Brown in his private capacity as contra-distinguished from his official capacity;' and then urges that the efficient cause which led to the obtaining of the money was the acts of the clerk in negotiating or selling the warrants and not the issuing of the warrants." From this it will be readily seen that the pleas in this case are not a restatement of appellant's contentions in the former case. All questions raised here by the trial court's action in sustaining an objection to the demurrers to the pleas were fully presented to this court in that case and were disposed of by the opinion therein adversely to appellant's contentions. According to the reasoning followed and the authorities cited in that opinion, the pleas in this case do not state a defense to the declaration, and the demurrer to them was properly sustained. The judgment of the trial court will be affirmed.

affirmed.

Not to be reported in full.

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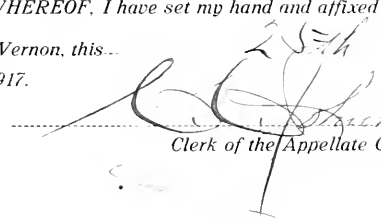
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this...

25th day of June, 1917.

A. D. 1917.


Clerk of the Appellate Court.

NOINI.

311-1 (206 app)
Gen. No. 6655. October Term 1916. Ag. No. 58.

Irene Rice, by her guardian, John A. Walker,
Appellee,

vs.

Royal Neighbors of America, Appellant
Appellant,

Appeal from Jersey

Opinion by Thompson, P. J.

*motion for
hearing
7/2/17*
Irene Rice, a minor, by John A. Walker her guardian, brought suit in assumpsit against the Royal Neighbors of America, a fraternal insurance corporation, upon a certificate issued to Alta M. Rice in the sum of \$1000 payable to her daughter, Irene Rice. The declaration consists of a special count, which pleads the benefit certificate in haec verba with an averment that Alta M. Rice died in good standing and had complied with all the conditions of the benefit certificate. The fifth of the conditions and agreements in the certificate is:— If the member holding this certificate shall * * * or if death shall result from criminal or self inflicted abortion or miscarriage * * * then this certificate shall be null and void and all rights accrued on account of this certificate shall be forfeited.

The defendant filed the general issue and special pleas. The special pleas aver that the contract sued on was between defendant and Alta M. Rice and consists of the by-laws of defendant, the application and the benefit certificates. It pleads the fifth condition in the certificate and avers that Alta M. Rice came to her death as the result of a self inflicted abortion contrary to the provisions of the contract. Several other special pleas set up the same defence in different forms.

The trial court refused to give a peremptory instruction requested by defendant, but did instruct the jury that the evidence conclusively shows that Alta M. Rice produced upon herself an abortion or miscarriage and the inquiry of the jury should be confined to the question whether or not her death resulted either directly

(Page 1)

or indirectly from the self inflicted abortion or miscarriage.

The jury returned a verdict for the plaintiff for \$1,129.12. A motion for a new trial was overruled and judgment rendered on the verdict.

The appellant insists that the verdict and judgment are against the clear preponderance of the evidence and appellee insists that although the insured committed an abortion on herself, that the abortion did not cause her

death but she died from pneumonia.

The physician who attended the deceased was first called on the afternoon of Sunday, August 10th, and found her suffering from hemorrhage and a small fetus in the vagina. He asked her what brought about her condition, and she told him she had used a hard rubber catheter and requested the physician not to tell her friends the exact cause.

There was an inquest and the coroners' jury found that she died from "general peritonitis as a result of her performing an operation by inserting a catheter by her own hand." There is no evidence that any physician attended the deceased until after she inflicted the abortion on herself and after the physician was called, she was only treated for conditions resulting from the miscarriage. She worked in a shoe factory and lost no time before using the catheter. She quit her work and returned home about ten o'clock in the morning of the day she used the catheter. There is some testimony given by members of her family and friends which tends to show that she had a cold and a slight cough for a few days before the abortion, but the evidence describing her condition at the time of and subsequent to the miscarriage leaves no reasonable doubt as to the cause of her death. She was infected and badly swollen. She had a high fever and rapid pulse without any cold noticeable and she made no complaint of cold to the physician. The physician, who treated her, examined her lungs and other organs

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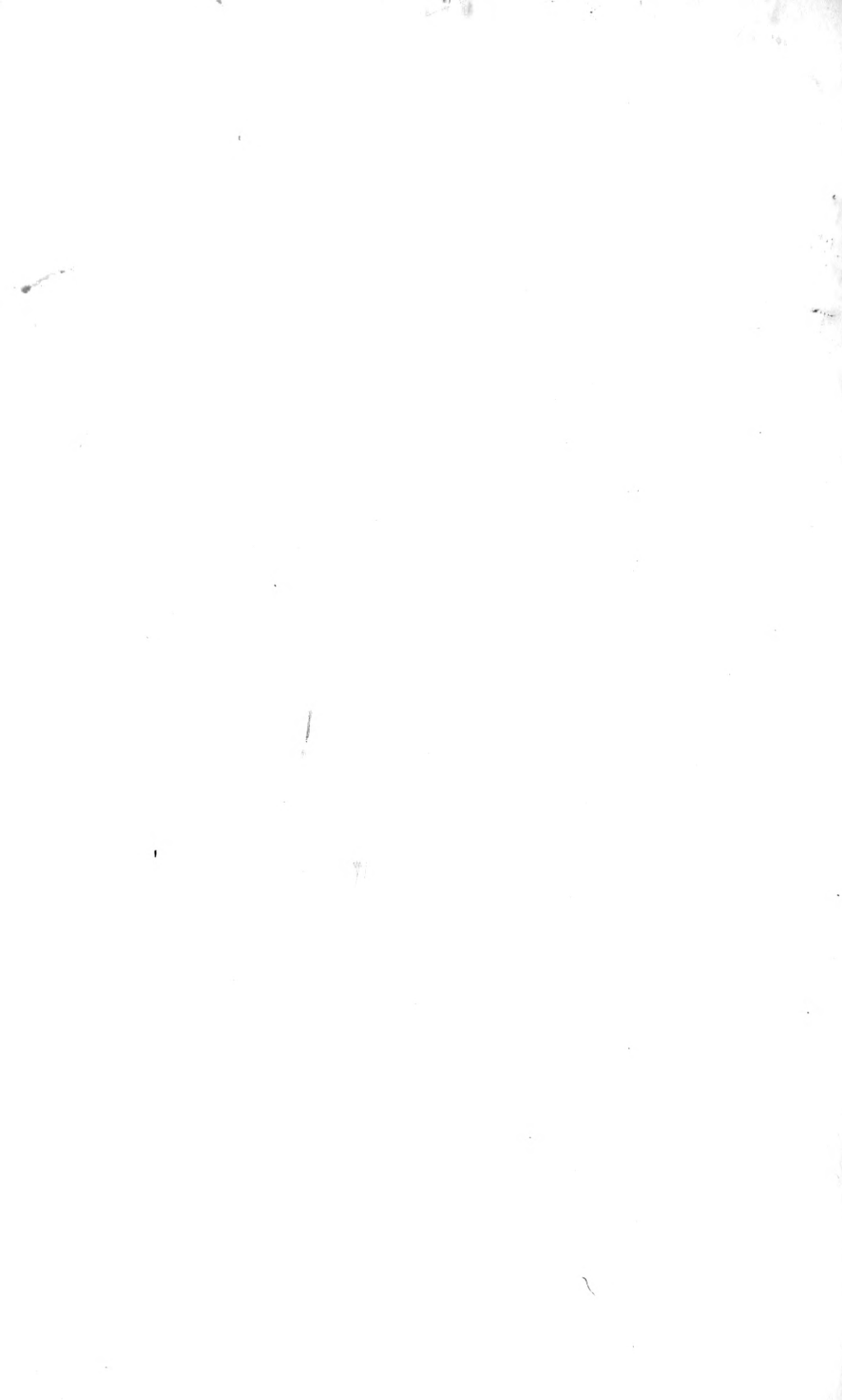
to see if she was in condition to take an anesthetic in order that her uterus might be curetted. Her functional organs were found in a satisfactory condition and an anesthetic was given and the operation performed but she died in about a week thereafter.

The manifest preponderance of the evidence shows that the abortion was the cause of her death. The judgment is reversed with a finding of fact.

Reversed.

Finding of fact to be incorporated in the judgment. The death of the insured was the result of and caused by a self inflicted abortion.

(Page 3)



3171

206 I.A. 493

Gen. No. 6665. October Term, 1916. Ag No. 91

John Y. Chisholm, Trustee in Bankruptcy, etc. Appellee
vs.

The First National Bank of LeRoy, Appellant

Appeal from McLean

Opinion by Thompson, P. J.

*Modified by
Re. Filed May 1, 1917
Petition for
Re Hearing Denied
Opinion Modified
and Re Filed July
2nd 1917*

This is an action in assumpsit brought to the September Term, 1911, of the circuit court of McLean county by John Y. Chisholm, trustee in bankruptcy of the Clarke Grain and Elevator Company of LeRoy, against the First National Bank of LeRoy, to recover certain payments of money made to it, which are averred to be preferential and contrary to the provisions of the national bankruptcy law. There have been three verdicts and judgments rendered in favor of the plaintiff. The first was for \$8815. That judgment was reversed by this court and the cause remanded. Chisholm vs. First National Bank, 176 Ill. App. 382. The second was for \$10,718.50 and was affirmed by this court, (Chisholm vs. First Nat. Bank, 190 Ill. App. 354,) but was reversed and remanded by the Supreme Court, because it was in part for money received and credited to a running account from which checks were thereafter paid, and concerning which the jury should have been instructed as to the law applicable thereto. Chisholm vs. First National Bank, 269 Ill. 110. The third judgment of the circuit court was rendered March 16, 1916, for \$6,297. 20. From that judgment the defendant prosecutes this appeal.

There has not been any change in the pleadings since the first trial in the circuit court, except to increase the ad damnum from \$10,000 to \$15,000. The evidence presented at the last trial was the record of the evidence introduced at the second trial, with the exception that some evidence was excluded, which had been criticised in the opinion of the Supreme Court. The opinion of that court states very fully the issues and the facts disclosed by the evidence, and it is not necessary to make any further statement of the facts at this time but that statement will be adopted, as the statement of the evidence and facts.

(Page 1)

It is contended that the verdict and judgment are contrary to the law and the manifest weight of the evidence. The statement of the evidence, and the law relevant to it, in the opinion of the Supreme Court shows that there is sufficient evidence to sustain the judgment and fully answers such contention of appellant.

cd / It is also insisted that the trial court erred in refusing three instructions requested by appellant. The first refused instruction which appellant argues should have been given is:—"The jury are instructed that the fact that the court has instructed you respecting the matter of measure of damages which may be allowed the plaintiff, in case you find that he is entitled to recover under the evidence, and these instructions, and the fact that defendant's counsel may have discussed the subject in argument before you, is not to be taken or regarded as implying in any way that the court has any opinion one way or another, or said counsel are admitting, that the plaintiff is entitled to any allowance of damages whatsoever." This instruction is merely cautionary. It states a correct rule of law and while it might have been given, it was not reversible error to refuse it.

Instruction number R, the refusal of which it is argued is reversible error, is:—"The court instructs you that in this case plaintiff is seeking to recover from the defendant the amount which the defendant received from the Clarke Grain and Elevator Company in payment of its note, on the ground that when the same was paid the defendant knew or had reasonable cause to believe that such payment would give it, the defendant, a greater percentage of its claim against the Clarke Grain and Elevator Company than other creditors of the same class would receive, in violation of the provisions of the Bankruptcy Act. You are further instructed that the law presumes, and therefore it is your duty as jurors to presume, that the defendant did not have reasonable cause to believe that such payment to it would give it a preference, and that the plaintiff can-

(Page 2)

not recover unless he has proved that the defendant knew or had reasonable cause to believe that such payment would give it the preference over other creditors of the same class."

In instruction number O given for appellant, the court after informing the jury as to some of the lawful rights of appellant to do certain things, then informed the jury that, "in this case plaintiff cannot recover unless he has proved by a preponderance of the evidence that at the time the Clarke Grain and Elevator Company note was paid to the defendant, it, the defendant, had knowledge of facts showing that the Clarke Grain and Elevator Company was insolvent, or had reasonable cause to believe that the said Grain and Elevator

Company was insolvent, and that the payment to it of said note would give it, the bank, a greater percentage of its claim than other creditors of the same class would receive."

~~This given instruction fully informed the jury of the legal proposition involved in instruction R.~~ If the evidence was evenly balanced on the issues referred to in the instruction, the appellee could not recover and the given instruction told the jury appellee could not recover unless he had proved the enumerated issues by a preponderance of the evidence.

The refused instruction is also faulty in not referring to the evidence and might have been refused for that reason. If it had stated that plaintiff cannot recover unless he has proved by the evidence, etc. it would not have been error to have given it, neither would it be reversible error to refuse it.

The other refused instruction, the refusal of which appellant insists is reversible error is:—"If you believe from the evidence and under the instructions of the court that the Clarke Company was insolvent at the time that it opened its account with the defendant, and that it remained so during the continuance of its transactions with the defendant bank, and that at the close of such transactions the Clarke Company had received more money from the bank than it had

(Page 3)

repaid to the bank, and that the payment of the note in question and interest thereon was a payment upon an open account and in the regular course of the business as it was transacted between the Clarke Company and the Bank, and that the Bank at the time it received such payment did not know or have reasonable cause to know that the Clarke Company was insolvent, your verdict should be for the defendant."

The appellee in this suit is seeking to recover as stated in the opinion of the Supreme Court, "the proceeds of the sale of the elevator and crib or corn amounting to \$9677.00, as a preferential payment, which, with interest at the time of trial amounted to \$10,718. The amount of the verdict and judgment subsequently rendered."

The sum of \$9677.00 received by appellant from the Clarke Grain and Elevator Company on March 20, 1911. is made up of two checks, one for \$6360 and the other for \$2337 received from Crumbraugh, payable to the order of appellant for the elevator and corn sold to

Crumbraugh by the Grain and Elevator Company, and of a draft for \$980 with bills of lading attached, which the cashier of appellant obtained from the company when it was about to forward the draft to one of its creditors named Boyd, at Indianapolis. The appellant applied \$5040 of the money received from Crumbraugh to the payment of the \$5000 note, and the balance of the Crumbraugh checks and the \$980 draft were credited to the overdrawn accounts of the company known as the Empire and LeRoy accounts. The LeRoy overdraft was \$4027.51. The Empire account overdraft was \$1,438.55.

The Supreme Court in its opinion states the law applicable to this case, both as to the overdraft and the note, as follows:—"Plaintiff in error insists the grain company was insolvent at the time it commenced business in LeRoy, which fact was unknown to plaintiff in error until after March 20, and that the net result of the transactions between it and the grain company was to increase the assets of the latter company more than \$1,000, and that therefore, under the 'net result rule,' the payments made to it are not voidable as preferences. *Jaquith vs. Alden*, 189 U. S. 78, (47 L. ed. 717,) and

(Page 4)

Wild & Co. vs. Providential Life and Trust Co., 214 U. S. 292, (57 L. ed. 1003,) and other cases, are cited in support of this contention. In each of the above cases cited there was a running account between the parties, and the effect of the payments made was to keep the account alive, with the result that new credits were extended and new goods placed in the stock which resulted in a net gain to the bankrupt estate, and it was there held that payments made on an open account, in the regular course of business, for goods sold and delivered within four months' period, without knowledge on the part of the creditor of the debtor's insolvency, were not voidable as a preference where the net result of such transactions was to increase, and not deplete, the creditor's estate. Under these holdings it would seem the plaintiff in error had a right to have such questions submitted to the jury under proper instructions, but no proper instruction on that question was offered by it. The instruction tendered was * * *. This instruction omitted, among other elements, the elements of open account, knowledge of insolvency and payments made in the regular course of business, and was properly refused."

With reference to the note, the opinion of the

Supreme Court states:— "The above two cases (National City Bank vs. Hotchkiss, 231 U. S. 50; Mechanics and Metals Nat. Bank vs. Ernst, 231 U. S. 60,) illustrate the point in question and are clearly distinguishable from each other and from the case at bar on the facts, and manifestly can have no application to any question involved here, except the payment on the \$5000 note made the morning of March 20, 1911. As to this item a different situation is presented. The money, which it was paid, never was deposited in the general account of the grain company and the situation of mutual accounts between the parties as debtor and creditor was never established as to it. On the contrary, the money was received and was applied directly in payment of the note with the intention of extinguishing the pre-existing debt evidenced by it. The payment on the note, therefore, is governed by the

(Page 5)

rule announced in Pirie vs. Chicago Title and Trust Co., 182 U. S. 444, Hotchkiss vs. National City Bank, supra, and Mechanics and Metals Nat. Bank vs. Ernst, supra, and is voidable as a preference."

The trial court gave at the request of appellant, instruction B, that:— "If you believe from the evidence that the defendant was interested in the sale of the elevator in question only in order to reduce the Clarke Company's overdraft and to assist the Clarke Company to procure money with which to continue business and did not at the time of such sale have reasonable cause to know that the Clarke Company was insolvent and that the defendant did not intend to obtain out of the Clarke Company's assets a greater per cent of the Clarke Company's indebtedness to it, than other creditors would receive of the money due them your verdict should be for the defendant." Instruction C, told the jury:— "If you believe from the evidence that the defendant at the time of the payment of the note in question believed that the Clarke Company owned enough corn to pay all its debts and have nearly \$1000 over and that it did not know or have reasonable cause to believe that the Clarke Company was insolvent at such time your verdict should be for the defendant." By instruction H, given for the defendant, the jury were told "**that the only issue before you in this case is whether the payment of the \$5000 note and \$40 interest thereon by the Clarke Company to the defendant constitutes a preference within the meaning of the Bankruptcy Act.**" Instruction I, given for defendant, told the jury that if the plaintiff failed to prove

by a preponderance of the evidence that at the time defendant received the Crumbaugh checks, it had knowledge of facts which would cause a reasonable man to believe the Clarke Elevator Company was insolvent, and the receiving payment of the \$5000 note would give it a preference over other creditors, the verdict should be for the defendant. Instruction J. applies the same rule to both the overdraft and the note.

The instructions given at appellant's request are very contra-

(Page 6)

dictory. The Supreme Court directed the trial court to instruct the jury concerning the "net result rule" as to the money applied in payment of the overdrafts. Instead of so instructing the jury, the court, by instruction H, took every issue from the jury, except the one involving the note, "the only issue before you in this case is," etc. The opinion of the Supreme Court states that as to the note a different situation is presented. "The money with which it was paid was never deposited in the general account of the grain company and the situation of mutual accounts between the parties as debtor and creditor was never established as to it." The money was received and applied directly in payment of the note with the intention of extinguishing the pre-existing debt evidenced by it. On examination of the bank books of appellant as they appear in the record, it will be found that the note was not charged up in the overdraft account, and the money paid on the note was not credited to that account.

Instruction F, attempts to make the "net result rule" applicable to the money paid on the note. The Supreme Court states that that rule does not apply to the money paid on the note. Instruction F, further states that if "the payment on the note in question and interest thereon was a payment upon an open account" etc. The instruction is inconsistent and contradictory within itself and attempts to state as facts matters for which there is no foundation in the evidence, and as has been stated, the rule of law attempted to be announced is not applicable to this note. There was no error in refusing the instruction.

No other question is presented for review. The *Made a Motion for a new trial on the ground that the appellant has assigned cross errors, but* ~~appellee states that it has assigned cross errors, but~~ "concedes that this court is bound to follow the decision of the Supreme Court and that it cannot do otherwise than affirm this judgment." ~~However, while~~ ~~appellee made a motion for a new trial and has filed an~~

additional abstract of the record, no cross errors have been assigned on the record in this court, nor are there any cross errors contained in the additional abstract.

(Page 7)

The judgment is for the sum paid on the note with interest thereon at five per cent. ~~There is no error in the record against appellant.~~ The judgment is therefore affirmed.

Affirmed.

(Page 8)

3175

206 I.A. 512

Gen. No. 6671. October Term, A. D. 1916. Ag. No. 69.

Emma Forwood Denny, Appellant,

vs

John J. Cox, Appellee.

**Appeal from Circuit Court
Macoupin County.**

Forwood Denny
Replevin
Denny
1916

Eldredge, J.

Appellant filed her bill in chancery for the specific performance of a written contract for the sale of real estate at the June Term, 1914, of the Circuit Court of Macoupin County. A decree was entered dismissing the bill for want of equity, to reverse which this appeal is prosecuted.

The contract provided that appellant, in consideration of \$12000 to be paid by appellee, agreed to convey by warranty deed the land in question and to deliver to appellee on or before March 1, 1914, an abstract showing a merchantable title thereto. The abstract, when furnished, showed several defects in the title so that it became necessary for appellant to file a bill to quiet title. The only persons made defendants to the bill to quiet title were the unknown heirs and devisees of certain named persons and the unknown owners of and parties in interest in the said real estate. The only service had, or that could have been obtained under the defendants to the bill, was by publication. Under Section 19 of the Chancery Act, a party who has not been served with summons or copy of the bill and has not received the notice required to be sent him by mail in case of publication, shall have three years in which to petition to open up the decree unless he is notified of the entry of the decree, in which latter case he shall

(Page 1)

have one year from the receipt of such notice. In the case of Smith vs. Hunter, 241 Ill. 514, it was held:

"The general rule is, that the sufficiency of an abstract of title, upon a bill for specific performance, is to be determined as of the date fixed by the contract or by the agreement of the parties when the party was to furnish the abstract and the deal was to be closed, and not at some time subsequent to the filing of a bill for specific performance. (Street vs. Franch, 147 Ill. 342; Gage vs. Cummings, 209 id. 120; Clark vs. Jackson, 222 id. 13.)"

The abstract in the case at bar when furnished did not show a merchantable title in appellant. Objection is also made that the bill to quiet title did not make all of the persons necessary to accomplish that purpose parties defendant, but without discussing that question it is sufficient to say that if the bill to quiet title was good and would have eventually cured the defects therein,

provided none of the defendants subsequently appeared and had the decree opened up, appellee was not compelled to pay the purchase price of the land and wait three years before he could be sure that he had a good title thereto. Smith vs. Hunter, **supra**.

The court properly dismissed the bill for want of equity and the decree is therefor affirmed.

(Page 2)

175
226 I.A. 527
Gen. No. 6593, October Term A. D. 1916. Ag. No. 8.

Lindsey Corbly, Defendant in Error,
vs.

Lida Corbly, Plaintiff in Error, and Fred
Corbly

Error to the County Court of
Ford County.

Graves, J.

This is an action in forcible entry and detainer begun in the County Court of Ford County by Lindsey Corbly, defendant in error against Lida Corbly and her husband, Fred M. Corbly. Lida Corbly brings the record here by writ of error for review.

The term began on February 14, 1916. Lida Corbly demanded a jury trial. The case was set for trial for February 22, 1916 at 1: 30 P. M. and a jury was summoned to appear at that time to try the case. On that day plaintiff in error filed her motion for a continuance, which was heard and allowed and the cause was continued until March 17, 1916. On that date plaintiff in error filed her second motion for a continuance which was heard and denied. The cause was tried by a jury. Plaintiff in error made no defense. The jury found the issues for the plaintiff and judgment was entered awarding the possession of the property in question to him.

The only question worthy of consideration presented by this record is whether the court committed reversible error in denying the second motion for a continuance filed by plaintiff in error.

The motion is based mainly on the ground that the health of plaintiff in error was such as to render it inadvisable for her to

(Page 1)

attend the trial as a witness. There is no sufficient showing as to when her health was likely to be such as to warrant her in appearing in court, or of any diligence in securing her deposition between the 22nd day of February when the case was first continued, and the 17th day of March, the time to which it was continued, or of any reason why the same was not taken, or of why it would not have been satisfactory. The motion addressed itself solely to the discretion of the trial judge, and we see no abuse of that discretion in the denial of it.

The exercise of a discretionary power by a court is never error unless it is clearly abused.

There are numerous matters set up in the affidavit that are entirely foreign to the case. These are of course without force as a cause for a continuance.

ed that the signature purporting to be hers on the lease

Plaintiff in error urges with apparent earnestness that the fact that her affidavit for a continuance showed on was a forgery, and that no one else could so well testify to that as herself, was alone sufficient to require the court to grant the continuance. Section 52 of the practice act provides that no person shall be permitted to deny the execution of an instrument in writing sued on, unless he shall verify his plea by affidavit. The plea of plaintiff in error was not verified. The execution of the instrument sued on was not in issue. She would not have been permitted to testify that the same was a forgery if she had been in court.

(Page 2)

It is next urged that the evidence in the record is not sufficient to sustain the verdict because it does not show that such notice to quit was given or demand for rent made as is required by law.

An original lease was introduced in evidence. Proof of holding over under that lease was made. Notice of the election of the landlord to terminate the lease and for immediate possession was shown. It was also conclusively shown that plaintiff in error had not only claimed adverse title to defendant in error but had undertaken to enforce that claim in court by a bill in chancery. Where a tenant claims adverse title to his landlord no notice to quit or demand for rent is necessary before bringing suit to dispossess him. **Evans v. Evans**, 163 Ill. App. 203. Where notice of the landlord's election to terminate the tenancy for non-payment of rent is given no other notice or demand for rent is necessary. **Woods v. Soucy** 166 Ill. 407. The notice proven in this case was sufficient.

There was no error in instructing the jury to find the issues for the plaintiff. All the essential elements necessary to the plaintiff's right to recover were proven and were uncontroverted. **Evans v. Evans**, 163 Ill. App. 203.

The judgment of the County Court is affirmed.

Judgment affirmed.

(Page 3)

3180
206 I.A. 533

Gen. No. 6627. October Term A. D. 1916. Ag. No. 38.

McNeil & Higgins Company, a corporation,
Appellant,

vs.

Greer College, a corporation, Appellee.

**Appeal from the Circuit Court of
Vermilion County**

Graves, J.

Appellant is a corporation maintaining a store in Chicago for the sale of groceries. It has a department maintained particularly for dealing with colleges and like institutions. This department is managed by a man by the name of Joseph F. Kelly.

Appellee is also a corporation. It owns a college building and certain other property in and about Hoopes-ton, but does not run the school. It was organized for pecuniary profit.

The college is run by one E. L. Bailey. He pays no rent for the use of the college buildings and property. He has what he makes out of the institution and also receives about \$1000 annually from an endowment fund. He ran a dining hall in connection with the school. He styled himself "President" of Greer College and sometimes signed letters in that style.

On August 11, 1908 he sent the following letter to the manager of the institutional department of appellant:

"Joseph F. Kelley,

Dear Sir:—Kindly send me prices of groceries for dining hall and oblige,

Yours truly,

E. L. Bailey,
Pres. Greer College."

On August 24, 1908 he wrote to the same person a second letter which is as follows:—

(Page 1)

"Dear Sir:—

Yours of the 20th inst. to hand and in reply will say that I received the journal you sent me but have not received the special letter, suppose it has been missent and will arrive later.

Thanking you for the same, I remain,

Yours very truly,

E. L. Bailey."

On August 28th he wrote a third letter which is as follows:—

"Dear Sir:—

Yours of recent date to hand, and in reply will say that if you can sell me groceries at 90 days, I will probably be able to do considerable business with you. As to responsibility I will refer you to Hamilton & Cunningham Bank or the First National Bank.

Very truly yours,

E. L. Bailey."

On September 3, 1908 appellant wrote to the First National Bank of Hoopes-ton the following letter:—

"Chicago, Sept. 3, 1908.

Gentlemen:—

We have been referred to you by Mr. E. L. Bailey, Pres. Greer College, of your city, who desires to open

an account with us. Will you kindly give us any information which you may have regarding the financial standing of this institution, and we can assure you that all such information will be much appreciated by us and held strictly confidential.

Thanking you in advance for a favorable response, for which we are enclosing you stamped envelope, we are,

Yours truly,
McNeil & Higgins Co.,
Per L."

On September 4, 1908, the president of the First National Bank of Hoopeston returned to appellant the foregoing letter of inquiry with the following written thereon:—

"Hoopeston, Ill., Sept. 4, 1908.

Pres. E. L. Bailey has been running the College successfully for two years, he claims a good scholarship this year, he advanced prices and should make some money. He owns a home near college and gets quite an income from that. He does not pay any rent for college building nor dormitory. The trustees keep the building in repair no expense to Bailey. He is building the college up. He also gets about \$1000 per year from an endowment fund.

Resp.

J. S. McFerren,
Pres."

On September 15, 1908 Bailey wrote the following letter to Kelley:—

"Dear Sir:—

In reply to yours of recent date will say that quite a number of the articles which you quote can be secured of our local dealers here at as low a rate as you are offering, but as there are a number of articles that you can furnish at lower rates will be glad to do business with you along that line and whenever I can secure supplies cheaper or as cheap as I can elsewhere will send you the order.

Inclosed you will find a sample order to begin with and should that prove entirely satisfactory as I trust it will, will be glad to do business with you.

Very truly yours,
E. L. Bailey."

(Page 2)

It does not appear that the officers of the appellee corporation ever knew of this correspondence until after this suit was begun.

Pursuant to this correspondence goods were sent on orders signed by E. L. Bailey. The goods were addressed to Greer College but were received and used by Bailey in his dining hall and payments made on the bills for them from time to time by check signed by Bailey. There is no proof that any of the officers of appellee ever knew of the transaction until after the payments therefor became delinquent. Neither is there any proof that Bailey was ever authorized by appellee to buy groceries or anything else on its credit.

Finally Bailey gave his note for \$1520.57 for the balance then due for groceries and appellant accepted and kept the same. On this note was written in pencil the words "taken as security." The testimony on this trial is not very definite as to when this memorandum

was placed on the note but Bailey testified that it was after he mailed it to appellant and on a former trial of this case one McGlasson, the general manager for appellant testified that it was made by his assistant after the note was received by him for appellant.

While, judging from the proof in this record, it may be true that appellant believed that Bailey was acting for appellee in buying the goods in question, there is no evidence from which a jury without acting unreasonably in the eyes of the law could conclude that appellee or any of its officers, ever authorized him so to do, or held him as having any such authority, or know that he was buying the goods or that the

(Page 3)

goods were received by it or used for its benefit or that it had been guilty of any act of omission or commission that would render it liable to pay for such goods.

At the end of all the evidence the court preemptorily instructed the jury to find the issues for the defendant. In this there was no error.

The judgment in favor of the defendant appellee here and against the plaintiff appellant here in bar of its action and for costs is therefore affirmed.

Judgment affirmed.

(Page 4)

3181
206 I.A. 534

Gen. No. 6663. October Term A. D. 1916. Ag. No. 62.

William Ryan,

Appellee,

vs.

L. E. Brown,

Appellant.

Appeal from the Circuit Court of
Tazewell County.

Graves, J.

Appellant is a farmer. He is also a breeder of trotting horses for the market. His method of marketing his horses and colts was to advertise them for sale in the Horse Review and other publications. One of these advertisements in the Horse Review reached appellee by mail. In it a horse called "The Circulation" was advertised for sale. His description as there given is as follows:

"The Circulation. Solid bay stallion. Foaled April 16, 1915. Trotter. Estimated height at maturity 15.3 to 16 hands. Registered standard. By THE EXPONENT 2:11-3-4 (son of Bingen 2:06-1-4 and Iva Dee 4, 2:12-1-2 by Onward) Dam AORTA 2:27;4) (which see on this list.)

THE CIRCULATION is a large, well grown, symmetrical, high styled, smooth, deep bodied, strong boned, good limbed colt. His dam's foals have all shown speed; every foal by his sire ever trained has been fast; taking these facts into consideration, no guess is called for—he's sure to be a trotter. He should make a magnificent 15.3 to 16 hand stock horse. Sound. Futurity engagements. Horseman, Stallion and Matron stakes."

The method of sale there advertised is a sort of auction by letter or by wire where in the prospective purchasers communicate to the seller their respective bids for the particular horses or colts desired. This advertisement contains the following: * * * "I point out every known unsoundness or blemish. If the veterinary certificate I mail you upon receipt of the purchase price reveals any other, your money will be refunded * * * "

The evidence tends to show that relying on the advertisement referred to appellee bid \$180 cash on the colt called "The Circulation;" that the bid was accepted by appellant by letter written January 27, 1916.

(Page 1)

which was received by appellee January 29, 1916; that on that date appellee mailed a draft to appellant for \$180 the amount of the bid; that after the receipt of the draft and on Monday, January 31, 1916, appellant wrote to appellee saying that the colt had been knocked down to him and passed to him as sound and in good health, but that on Sunday, January 30, 1916, "some of my colts turned up with signes of old fashioned colt distemper. As a result, we have every one of them up in stalls and several of them today, including "The Circulation," have little abscesses under their throats. * * * Dr. Whipple tells me the dis-

temper is very severe around here this year * * * P. S. Dr. Whipple says he has been so busy he neglected to send certificate, but over the phone yesterday promised to send at once."

A certificate signed by Dr. Whipple finally came and was dated January 26, 1916. The evidence does not show when it was in fact made or sent to appellant or by him to appellee although the Dr. does say it was made as a result of an examination made on January 26, 1916, which it will be observed was the day before the colt was sold to appellee. No certificate signed by any veterinary on the day the colt was sold is shown in this record.

The evidence strongly tends to prove, and the jury evidently believed, that the colt was infected with distemper and was not in fact sound and in good health on the day he was sold. ~~He died from distemper shortly after he was paid for by appellee.~~ Suit was brought by appellee to recover the purchase price paid for the colt.

The jury found the issues for the plaintiff and assessed his damage at \$180. Judgment was entered on the verdict.

The statement in the advertisement that the horse was "sound"

(Page 2)

constituted a warranty and not a mere representation. **Robinson v. Harvey** 82 Ill. 58. **Reed v. Hastings** 61 Ill. 266, **Forster, Waterberry & Co. v. Peer** 120 Ill. App. 199.

The letter of appellant dated January 31, 1916, in which he says the veterinary examined the colt when he was "knocked" "down" to appellee and "passed him as sound and in good health" tends to show that appellant understood that he was selling him under a warrant that he was sound and in good health. The further fact that appellant advertised to return the money paid for any horse who was shown by certificate of the veterinary to have any other unsoundness or blemish than that pointed out by the owner before the sale was itself undoubtedly intended to be understood as a warranty that every horse sold as sound was in fact sound, and must have been so understood and should be so construed. The colt here in question was sold as sound.

A horse at the time he is sold is affected with the disease of distemper is not sound. **Kenner v. Harding** 85 Ill. 264. **McCann v. Uiman**, 109 Wisc. 574.

There were at least three erroneous instructions given for appellee, but the verdict is so manifestly right on the facts, that we do not feel justified in reversing the judgment for errors in instructions.

Finding no reversible error in this record the judgment is affirmed.

(3153)

206 I.A. 538

Gen. No. 6647.

October
~~April~~ Term 1916

Ag. 4.

CHILDERS & LILLIENSTEIN, (A Corporation),

Appellant.

vs.

ILLINOIS CENTRAL R. R. CO.

Appellee.

Appeal from Sangamon

Opinion by Thompson, J.

*reversed
not upheld
S.K.-Jec*

This suit is between the same parties, was begun at the same time, before the same Justice of the Peace, was appealed to the Circuit Court and there tried before the same jury and at the same time with cases number 6646, 6660 and 6661, now pending in this court. The cases are all submitted on the same bill of exceptions. In this case a verdict was returned in the Circuit Court in favor of the plaintiff for \$120, on which judgment was rendered.

d

Appellee seeks to recover for the death of a mule shipped from Benton, Illinois, to Springfield, February 16, 1915. The evidence shows that one Saunders of Benton, telephoned Eli Lillienstein that he had some mules for sale. Lillienstein, who had not seen the mules before, went to Benton and bought twenty-five, which were shipped that forenoon. When they arrived at Springfield, one of the mules was sick and died three days later of pneumonia. The contention of appellee is that there is no evidence that the mule did not have pneumonia when it was shipped or that it contracted the disease while in the possession of appellant.

The mules were shipped under a uniform limited liability live

Page 1

apl

stock contract signed by an agent of appellee and introduced in evidence by it. The contract is similar to that under which the shipment in case No. 6646 was made. The notice required by the contract was not given but appellee argues that the requirement concerning the giving of notice was waived.

The bill of exceptions contains no evidence tending to show any waiver. The record contains certain correspondence certified to the Circuit Court by the justice of the peace, but this correspondence is not referred to in the bill of exceptions, and there is nothing in the bill of exceptions tending to show it was introduced in

< evidence in the trial in the Circuit Court. Evidence not preserved in the bill of exceptions may not be considered by the Appellate Court. Seidschlag vs. Town of Antioch, 109 Ill. App. 291. What was said in reference to the failure to give notice in No. 6646, applies to this case. The judgment is reversed with a finding of fact that no notice was filed within ten days as required by the shipping contract.)

Reversed.

206 I.A. 539

Gen. No. 6660.

October
~~April~~ Term 1916

Ag. 6.

CHILDERS & LILLIENSTEIN, (A Corporation),

Appellant.

vs.

ILLINOIS CENTRAL R. R. CO.

Appellee.

Appeal from Sangamon

Opinion by Thompson, J.

This is one of the series of cases referred to in No. 6647. In this case the verdict and judgment in the Circuit Court were in favor of the defendant.

Appellant brought suit to recover from appellee damages for an injury to a mare shipped July 2, 1915, with other mares and mules from Bloomington to East St. Louis with the privilege to stop at Springfield to finish loading. The contention of appellant is that the mare was injured on the hip by some projection in the car. As in No. 6646, the evidence does not show when the mare was injured but the evidence on that question is that the mare had an injury to her hip and the first time the injury was seen was in the barn of the consignee.

The mare was shipped under a limited liability live stock contract signed by an agent of appellee similar to the contracts under which the shipment in 6646 and 6647 were made. The notice required by the contract was not given but the argument of appellant is that the giving of the notice was waived. It is contended in this case

Page 1

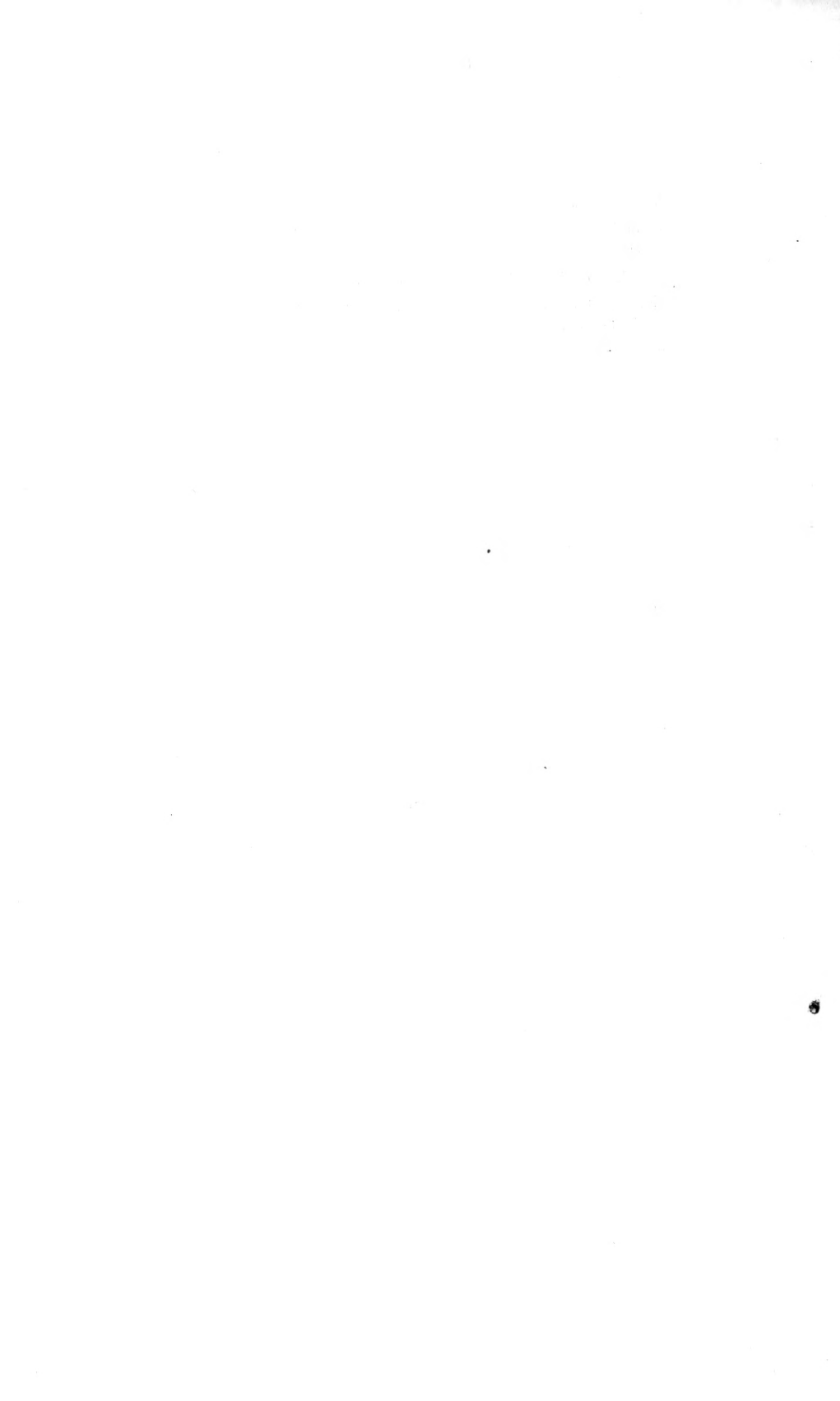
that there is no evidence that appellant had knowledge of the provision of the contract. Appellant offered the contract in evidence signed by it, by its agent Childers. It neither offered evidence nor made any contention in the trial court that it did not have full knowledge what it was signing.

The first instruction given at the request of appellant told the jury that if it believed from the evidence that the defendant entered into a contract to safely carry the horses of plaintiff "and negligently failed to deliver said horses safely and that the plaintiff complied with all the conditions of said shipping contract on its part," then it should find the issue for plaintiff. Another instruction of the same purport was given at appellant's request. It now complains of instructions given at the request of appellee informing the

jury that before appellant can recover it must believe from the evidence that it had complied with the contract by giving the required notice. Appellant may not complain of instructions announcing the same propositions that were requested and given at its instance. There is no error in the instructions and the judgment is affirmed.

Affirmed.

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Gen. No. 6661.

Circuit
~~April~~ Term 1916

Ag. 7.

CHILDERS & LILLIENSTEIN, (A Corporation),

Appellant.

vs.

ILLINOIS CENTRAL R. R. CO.

206 I.A. 540
Appellee.

Appeal from Sangamon

Opinion by Thompson, J.

This is one of the series of cases referred to in No. 6647. In this case the verdict and judgment in the Circuit Court were in favor of the defendant.

In this case appellant brought suit to recover, from appellee, damages for an injury to a mare shipped June 24, 1915, with other horses and mules from Blomington to East St. Louis, with the privilege to stop at Springfield to finish loading. The evidence shows that when the horses were being loaded into a car at Bloomington, the mare, for which damages are claimed, broke through the floor of the chute which was in bad condition, with one hind leg and a large sliver was driven into her leg above the hoof, permanently crippling her. Childers, one of the stockholders, who is the principal buyer for appellant, verbally notified the agent of appellee at East St. Louis and at Blomington, of the injury. That is the only evidence of notice of the injury. The contract, under which the mare was shipped, was similar to the contracts under which the other shipments were made. There was no attempt to comply with the requirements of the shipping contract and there is no evidence in

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the bill of exceptions of any waiver of the notice. There is in the record correspondence between the parties certified by the Justice of the Peace to the Circuit Court, but it does not appear to have been offered in evidence in the Circuit Court. What was said in cases numbered 6646 and 6660 applies to this case and no useful purpose would be served by repetition. The judgment will be affirmed.

Affirmed.

Gen. No. 6692.

April Term 1917.

Ag. 15

LOLA HESTER, Defendant in Error.

vs.

FRED HESTER, Plaintiff in Error.

Error to Vermilion.

Opinion by Thompson, J.

Lola Hester filed a bill to the May Term 1913 of the Circuit Court of Vermilion county against her husband, Fred Hester, for a divorce on the ground of extreme and repeated cruelty. The bill alleges that complainant is and had been for more than fifteen years past a resident of Vermilion county, Illinois, and that the defendant had been guilty of extreme and repeated cruelty towards the complainant and specifically alleges "that on November 1, 1909, the defendant struck her a violent blow on the head with his fist without any provocation whatever; that on or about November 15, 1910, defendant struck and slapped complainant with his hand and dragged her from her bed, that during the month of November 1910, he otherwise cruelly treated complainant" and used towards her obscene, profane and opprobrious language so that she was compelled to cease living with him; that a child Evelyn was born to them, now four years of age and for the past two years defendant has failed to furnish complainant and their child proper support and maintenance and that he is not a fit person to have the care and custody of said child. The summons issued to the May Term was returned "defendant not found." An alias summons

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to the October Term was served on the defendant and he filed an answer to which a replication was filed. The case was heard at the October Term without a jury, and on December 13, 1913, the court made an order granting a decree of divorce on the ground of extreme and repeated cruelty and directing the payment of \$100 alimony annually in quarterly payments of \$25, the first payment to be made January 1st next, and awarding the custody of the child to complainant. The decree however appears not to have been filed until December 30, 1913. It recites that the court heard documentary and oral evidence of witnesses examined in open court and findings of all necessary jurisdictional facts as to the residence

and jurisdiction of the parties, and that the parties were married and lived together "until November 13, 1910, when complainant was forced to leave defendant on account of extreme and repeated cruelty, the court here-in finding that the defendant was guilty of extreme and repeated cruelty as alleged in the bill of complaint;" and "that the allegations of complainant's bill are true." It also finds that defendant is not a fit person to have the care and custody of the child Evelyn.

It then finds that complainant is entitled to a decree of Divorce on the ground of extreme and repeated cruelty and adjudges that a divorce is granted, and that complainant have the care and custody of the child without any interference on the part of the

Page 2

defendant

until further order of the court and orders that alimony be paid as heretofore stated until the further order of the court.

During the May Term, 1915, on September 11, Lola Hester filed a petition for a rule on the defendant to show cause why he should not be adjudged in contempt of court for failing to pay alimony, and a writ of attachment was issued for the defendant returnable September 20. Nothing further is shown by the record until sometime during the May Term 1916, when Fred Hester, by his solicitor, made a motion to quash the writ of attachment and to vacate the order granting alimony for the reason that the said decree is insufficient and not binding on your said defendant in that there has been preserved no certificate of evidence and there is no specific finding of fact which would warrant the relief prayed for. The foregoing is all that is shown by the record and the motion to quash is still pending.

On December 14, 1916, three years and a day after the trial court announced its decision, the defendant Fred Hester sued out a writ of error, and assigns for error (1) that the decree of divorce is void because it contains no finding of facts showing extreme and repeated cruelty and is not supported by a certificate of evidence; (2) that the court erred in granting a writ of attachment on a void decree, and (3) that the court erred in awarding alimony and in awarding the custody of the child to complainant without the necessary finding of facts.

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The only question presented for review is whether the decree can be sustained without the evidence having been preserved by a certificate of evidence. The plaintiff in error has cited two cases, *Ohman vs. Ohman*, 233 Ill. 632; and *Trenchard vs. Trenchard*, 245 Ill. 313, which appear to be decisive of the question. These cases were suits for divorce, heard on bill, answer, replication and evidence in open court, wherein decree had been granted on the ground of extreme and repeated cruelty. In the *Ohman* case it is said, "The evidence was not preserved in the record and the only finding of the decree is that the allegations in the said bill contained are true as therein stated and the equities of this cause are with the complainant."

"In chancery it is incumbent upon the party in whose favor a decree granting relief is entered to preserve in the record the evidence justifying the decree. Contrary to the rule of law, no presumption will be indulged that evidence sufficient to sustain the decree was heard if such evidence does not appear in the record. The general finding that all the material allegations are proved and that the equities of the case are with the complainant will not sustain a decree granting relief where there is no finding of specific facts and the evidence is not preserved in the record." The decree was reversed.

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In the *Trenchard* case, the decree recited a finding "that the defendant has been guilty of extreme and repeated cruelty as charged in complainants bill of complaint." The opinion first states "we are of the opinion the bill does not state a case of extreme and repeated cruelty within the meaning of our statute." Two acts of physical cruelty were alleged in the bill in detail, and are charged to be extreme and repeated cruelty. Other acts of cruelty are also alleged, one of which was sending complainant away from home just before the birth of a child, because her presence embarrassed the daughter of defendant by a former marriage. The opinion states that there is no certificate of evidence in the record from which the character of the acts complained of as extreme and repeated cruelty can be determined. "The recital that plaintiff in error had been guilty of extreme and repeated cruelty as charged in complainants bill is wholly insufficient as a finding of facts under the allegation of the bill to sustain the de-

cree. * * * It has been repeatedly held that a decree in chancery granting affirmative relief must be supported by evidence preserved by a certificate of evidence or a finding of facts in the decree itself. * * * On the record before us * * * the decree of the Circuit Court cannot be sustained."

In the Trenchard case the allegations of the bill and the findings in the decree were substantially the same as in the case now before us. The court there having held that the decree could not be

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sustained without a certificate of evidence, this decree must be reversed and the cause remanded.

Reversed and Remanded.

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3187

Gen. No. 6695.

April Term 1917.

Ag. 18.

PEOPLE OF THE STATE OF ILLINOIS,

Defendants in Error.

vs.

TILLMAN PHILLIPS, Plaintiff in Error.

200 I.A. 542

Error to Champaign.

Opinion by Thompson, J.

An indictment containing eight counts was returned by the grand jury of Champaign county charging Tillman Phillips with the sale of intoxicating liquor in anti-saloon territory. The defendant pleaded not guilty and on a trial a jury returned a verdict finding the defendant guilty on each count. The defendant was sentenced to fifteen days imprisonment in jail on each count, the time of confinement on the second count to begin at the expiration of the time of confinement on the first count, etc. and to pay a fine of fifty dollars on each count. The defendant prosecutes this writ of error to review that judgment.

The plaintiff in error had a second hand store at No. 113 North Market Street in the City of Champaign. There is a basement, partitioned into smaller rooms with seats in them, under the room in which plaintiff in error conducts the second hand store, with a stairway from the second hand store to the basement, and an entrance to the basement from the rear of the building. It was stipulated

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that the town of Champaign, in which the building was situated, is and was anti-saloon territory during the time covered by the indictment.

It is insisted on behalf of plaintiff in error that the court erred in permitting three witnesses to be examined on behalf of the people, whose names were not endorsed on the back of the indictment. That was a matter in the discretion of the trial court and was not error. (Gore vs. The People, 162 Ill. 259; People vs. Steinhauer, 248 Ill. 46.) Moreover the abstract does not show any objection to any of the three witnesses testifying, and the court granted a postponement, after the evidence for the state had been closed in the forenoon, to 2:30 P. M. on the request of defendant in order that witnesses desired by him might be subpoenaed.

ad | It is also contended that the evidence does not su-

tain the verdict and judgment. A certificate of an internal revenue special tax stamp to T. H. Phillips and W. G. Mullin as retail liquor dealers at 113 N. Market Street, Champaign, was introduced in evidence without objection, with evidence that Phillips was in and about the basement and that he sold liquor in the basement at different times to different parties. The evidence is ample to sustain the judgment.

It is also contended that the court erred in giving instructions requested by the people. Thirteen instructions were given at

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the request of the people and ten at the request of the defendant. Only eight of the instructions given for the people are in the abstract, and it contains none of those given for the defendant. The instructions are given as a series and are not the instructions of the parties and should all be shown in the abstract.

It is stated that two of the people's instructions are erroneous because they do not tell the jury that it may find the defendant guilty on one count and not on all the counts. In another instruction the jury are informed that "if you believe from the evidence beyond a reasonable doubt that the defendant has sold intoxicating liquor in anti-saloon territory, then for each sale so made if proved beyond a reasonable doubt the defendant would be liable and you should find the defendant guilty on as many counts as you believe beyond a reasonable doubt from the evidence in the case sales were made." The instruction as to the form of the verdict, if the jury should find the defendant guilty, also requested the jury to name the particular counts under which they found him guilty. The jury were fully instructed in the particular complained of, and the jury could not be misled by the instructions given.

The eleventh instruction for the people told the jury that,—"The Statutes of the State provides that the issuance of an Internal Revenue Special Tax Stamp or Receipt by the United States to any

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person as a wholesale or retail dealer in liquors at any place within the territory which, at the time of the issuance thereof is anti-saloon territory shall be prima facie evidence of the sale of intoxicating liquor by such person at such

place or at any place of business of such person within such territory where such stamp or receipt is posted and at the time charged in any suit or prosecution under the anti-saloon act; provided, such time is within the life of such stamp or receipt." Instruction twelve is:—"The court instructs the jury that prima facie evidence is evidence sufficient to establish a fact unless that evidence is rebutted." Counsel state they do not object to number eleven but that they do to "number twelve when taken with instruction eleven because it singles out testimony as defined in twelve." Eleven is a copy of the statutes and twelve is a definition of prima facie evidence. There is no error in the instruction.

There is no error in the case, and the judgment is affirmed.

Affirmed.

Gen. No. 6713.

April Term 1917.

Ag. 36.

DELLA ROBINSON, Guardian of Oather Smith,

Plaintiff in Error.

vs.

W. D. SMITH, FRANK L. OSBORNE AND F. J. TRIMBLE

Defendants in Error.

Error to Coles.

Opinion by Thompson, J.

In April, 1905, Oather Smith was about three years old. There was due her at that time from the estate of her mother, Minnie Smith, of which Frank L. Osborne was the administrator, the sum of \$780. W. D. Smith, her father, was appointed her guardian and his bond as such guardian was signed by Frank L. Osborne and Will C. Trimble. W. D. Smith loaned the money of his daughter to Frank L. Osborne taking his note therefor bearing interest at 6 per cent per annum with personal security. On June 16, 1916, the guardian filed a report showing \$1298.01 on hand belonging to the ward, the same being the principal sum with annual interest at 6 per cent to that date. On the same day he resigned as guardian and B. F. Kelley was appointed guardian. The report was approved by the County Court, and the money of the ward was paid over to the new guardian. W. D. Smith was then discharged as guardian. Subsequently the ward selected Della Robinson, a sister of the mother of the ward, to be the guardian of her estate.

Della Robinson, guardian, filed this bill in equity against Smith and his surety Osborne and F. J. Trimble, who is the only heir

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of Will C. Trimble, the other surety who is deceased, and who as such heir received personal property from his father's estate, for an accounting, claiming that if the interest had been collected annually by the father of the ward, while he was guardian and reloaned, the ward would, from the compound interest, have had \$180 more at the time Smith was discharged.

The case was heard before the court and a decree entered dismissing the bill for want of equity. The present guardian prosecutes this writ of error to review that decree. No objection or assignment of error

Gen. 27: 1-28

Gen. 28: 1-22

Gen. 29: 1-30

Gen. 30: 1-24

Gen.

Gen. 31: 1-35

Gen. 32: 1-32

Gen. 33: 1-20

Gen. 34: 1-30

Gen. 35: 1-29

Gen. 36: 1-43

Gen. 37: 1-36

Gen. 38: 1-30

Gen. 39: 1-23

Gen. 40: 1-23

Gen. 41: 1-57

Gen. 42: 1-38

Gen. 43: 1-34

Gen. 44: 1-34

Gen. 45: 1-28

Gen. 46: 1-34

Gen. 47: 1-26

Gen. 48: 1-22

Gen. 49: 1-28

Gen. 50: 1-26

Gen. 51: 1-34

Gen. 52: 1-34

Gen. 53: 1-34

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Gen. 54: 1-34

Gen. 55: 1-34

Gen. 56: 1-34

Gen. 57: 1-34

Gen. 58: 1-34

Gen. 59: 1-34

Gen. 60: 1-34

Gen. 61: 1-34

Gen. 62: 1-34

Gen. 63: 1-34

Gen. 64: 1-34

raises any question over the way in which the case was heard. The evidence shows that Smith had paid \$275 to Della Robinson for the support of his daughter from 1906 to 1909; that he had paid out \$180 for clothing for her to the time of his discharge, \$35 for music, and the costs and attorneys fees in the guardianship matter. All these payments were made from his own means and he has never charged anything for guardian's compensation or commission.

The estate has netted six per cent annually and has not sustained any loss or been at any expense. If the guardian had charged the usual commissions and expenses the estate might not have been nearly as well off as it is at present. This father, as guardian, paid all the expenses of the estate and of his daughter from his own funds although he is a tenant farmer and had but little means.

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The present guardian is not acting in the interest of the ward in the prosecution of this suit. Neither fraud nor error appears in the report of the guardian, which was approved by the County Court after the new guardian had been appointed. The guardian, from the evidence, left the money with Osborne until the time he resigned. The Statutes, Sec. 22, Chapter 64, provides how a guardian shall loan the money of his ward. The Statutes was not followed but the money was forthcoming and there was no loss or expense to the ward. The guardian did not use the money of his daughter, it was not in his hands at any time and under the circumstances surrounding this case we see no reason for the filing of this bill. The decree will be affirmed and the costs of this writ of error will be taxes against the present guardian personally.

Decree affirmed.

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Gen. No. 6727.

April Term 1917.

Ag. 48.

JOSEPH WALLACE, Appellee,

C. E. LAWSON, JAMES JENKINS and WILLIAM

SMITH, Appellants.

Appeal from County Court

of Coles County.

206 I.A. 573

Opinion by Thompson, J.

Joseph Wallace brought suit before a police magistrate in replevin to recover a consignment of whiskey claimed to have been wrongfully taken by the defendants. The property sought to be replevied could not be found by the officers who served the writ on the defendants. On the trial judgment was rendered, Aug. 8, 1916, against the defendants for \$108.90. An appeal was prayed for to the County Court by the defendants. The magistrate fixed the amount of the bond at \$150. A bond in the amount fixed by the magistrate was executed by the defendants with a surety and approved by the magistrate August 18, 1916.

The appeal was perfected to the County Court. The law term of the County Court convened February 5, 1917. The record shows that on that day the "defendants" made a motion to dismiss the appeal. The motion was allowed and "appeal dismissed at appellants costs." The defendants prayed and have perfected an appeal to this court.

The bill of exceptions recites that after the parties had announced themselves ready for trial, and after the examination of the jury had begun, "counsel for appellee entered a motion to dismiss the

Page 1

cause" for insufficiency of the appeal bond and the motion was "granted." If the record is correct then the appellants in this court have appealed from the allowance of a motion made by themselves, and if the bill of exceptions is correct then they have appealed from a motion by which the suit was dismissed.

The judgment before the magistrate was for \$108.90. The bond should have been fixed at double the amount of the judgment and costs. The Justices' Act directs that an appeal from a justice shall not be dismissed for any informality in the bond and the court shall allow a party to amend the bond within a reasonable time so that a trial

may be had on the merits of the case. The Constitution provides that the jurisdiction of Justices of the Peace and Police Magistrates shall be uniform and Section 115 of the Justices' Act applies to both Justices of the Peace and Police Magistrates. The Police Magistrate fixed the amount of the bond and appellants gave the bond which was approved by the justice. The appellants should not be prejudiced by any informality or deficiency in the bond if they will, when objection is made, remedy the defect.

"The proper practice is after the bond is adjudged insufficient to enter a rule against the appellant that unless he executes and files a sufficient bond a day to be named the appeal will be dismissed." *Wear vs. Killeen*, 38 Ill. 259; *Town of Partridge vs. Snyder*, 78 Ill.

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519; *Enright vs. Rehbach*, 133 Ill. App. 50; *City of Sullivan vs. Henry* (Opinion filed April 16, 1917, 3rd District.) It was error to dismiss the appeal without entering a rule on the appellants to give a good and sufficient bond within a time fixed by the court.

It is also contended that the bill of exceptions does not show an exception to the order dismissing the appeal. No exception is necessary. *Miller vs. Anderson*, 267 Ill. 608; *Britton vs. Davis*, 273 Ill. 31.

The judgment is reversed and the cause remanded.
Reversed and Remanded.

Page 3

W. J. SICKAFUS, Appellant,

vs.

WALDO VICKERY, Appellee.

Appeal from Moultrie.

206 L.A. 584

Opinion by Thompson, J.

W. J. Sickfaus began this suit before a justice of the peace against Waldo Vickrey to recover \$100 claimed to be due him as a commission on a real estate trade. The case was tried by a jury in the justice court and a verdict returned and judgment rendered in favor of defendant. Plaintiff appealed to the Circuit Court where a jury again returned a verdict in favor of defendant on which judgment was rendered. Plaintiff appeals to this court.

The evidence shows that appellant was a real estate agent in the city of Sullivan. Waldo Vickrey owned a farm of 110 acres in Greene County, Indiana, and was engaged in the poultry business in the city of Sullivan. Jason Sullivan owned some real estate in the city of Sullivan. Appellant claims to have negotiated a trade of the appellee's farm in Indiana for the Sullivan property of Jason Sullivan. He testified that appellee agreed to pay him a commission of \$100 if appellant would make the trade of the farm for property in Sullivan. A trade was made of the Greene county farm for the property in Sullivan owned by Jason Sullivan. The evidence of appellant shows that Jason Sullivan, who is a relative of his by marriage, had

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listed his property with appellant for sale or trade, about a year and a half before the making of the trade for which appellant seeks to recover a commission. The agency for the sale of the Sullivan property had never been taken away from the appellant although appellant claims the agency was only for a limited time. Appellant testified that appellee gave him the agency to trade his farm and agreed to pay him \$100, if he would secure a trade. Appellee testified that he never listed his farm with appellant and never agreed to pay him any commission; that appellant came to him and tried to sell him property and that appellee said he had a farm in Indiana and appellant suggested that maybe he could trade the Sulli-

van property for the farm. The evidence also shows that Sullivan said he expected to pay appellant a commission for the trade. The evidence tends to show that appellant was trying to act as the agent of both parties.

After appellant had testified to an express contract he offered evidence of what would be the reasonable and customary commission for making the trade. Such evidence was merely argumentative when offered of the reasonableness of his charge and not proper at that time. After the appellee had denied making a contract the evidence might under some circumstances be proper but when offered the objection was properly sustained.

We have carefully reviewed the criticisms made by counsel con-

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cerning the given and refused instructions. We find no error in any of the matters of which complaint is made and the jury were fully and fairly instructed.

The issue of fact was one peculiarly within the province of a jury to decide and the verdict is sustained by the evidence. There is no error of law in the case. The judgment is affirmed.

Affirmed.

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Gen. No. 6513.

April Term, A. D. 1916.

Ag. 18.

EMMA J. RICKLY, Executrix of the last will of
GEORGE C. RICKLY, deceased. Appellee.

vs.

PARLIN & ORENDORFF CO.

Appellant.

Appeal from City Court. City of Canton.

ELDREDGE, J.

Appellee filed her amended bill for discovery against appellant to which amended bill the latter demurred and from the judgment of the court overruling the demurrer and ordering an answer to be filed this appeal is prosecuted. When discovery is the only relief sought in a bill a decretal order overruling a demurrer and ordering an answer is final and appealable. Robson vs. Doyle, 191, Ill. 566; Grimes vs. Hillery, 38 Ill. Ap. 246.

It is averred in the amended bill that George C. Rickly in his lifetime was possessed of and in the exclusive control of all patents and exclusive right to manufacture and market a certain machine known as the Campbell Sub-Surface Packer; that said packer is a valuable machine for packing the soil beneath the surface after it has been plowed, and is made in the following sizes: 10, 16, 20, 24 and 36 wheels each; that on December 23, 1908 said Rickly entered into a contract with appellant in which he granted

Page 1

the exclusive right to manufacture said packers to appellant, and in consideration for the above exclusive right, appellant agreed to pay to said Rickly a royalty of twenty-five cents per wheel for 10 wheel machines and twenty cents per wheel for 16, 20 and 24 wheel machines, during the life of the patents; that appellant manufactured said packers until about December 29, 1911 when said contract was modified by agreement of the parties thereto, in that said Rickly was to make a discount of 10 per cent from the above named royalty prices for all said packers said appellant should manufacture from January 1, 1912 until the expiration of said patents which was August 27, 1912; that said Rickly preformed his part of said contract but that said appellant has failed and refuses to preform its part of the contract in that it refused to pay to said Rickly during his lifetime and has refused and continues to refuse to pay to appellee, as executrix, the royalties as provided in said contract; that appellee, as executrix of the estate of said George C. Rickly, deces-

ed, has filed her suit at law against appellant in the City Court of Canton to recover from it the royalties due and unpaid; that she is informed and believes that appellant is a large manufacturing corporation with a voluminous and complex system of book-keeping, and that she has no way of knowing whether the information hereinafter asked for in this bill of discovery

Page 2

was kept in appellant's regular system of book-keeping or in some secret method for the purpose of defeating the aforesaid royalties; that during the period from December 23, 1908 to August 27, 1912, appellee is informed and believes appellant manufactured and sold a large number of said packers throughout the United States and foreign countries and that appellant made and had in its possession and in the possession of its agents throughout this country and foreign countries a large number of said packers manufactured during the period covered by the above contract which it had not sold at the time of the expiration of said patents; that said Geo. C. Rickly in his lifetime was unable to get a statement from appellant showing the number and kind of packers manufactured by it during the period covered by the contract, or any part thereof, though often requested for the same, and that appellee has been unable to get a statement from it showing the number and kind of said packers manufactured by it during the period covered by said contract or any part of said period; that the facts and information asked for in this bill are well known to the defendant herein and to U. G. Orendorff, its secretary and treasurer, and said facts and information are in its and his exclusive possession; that appellee as executrix of the estate of said George C. Rickly, deceased, has a good and meritorious course of action against appellant in her suit at

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law but she will be unable to prove her claims, unless she is given the discovery hereinafter asked as she has no other way of finding out or being able to prove how many of said packers were made and manufactured by appellant during the period covered by said contract than by the discovery hereinafter asked; that it is material and essential in her said suit at law that she have the evidence herein asked to enable her to prove the number of said packer wheels made during the life of

said contract and without such evidence she cannot prove her said case at law; that said Orendorff is secretary and treasurer of said appellant, the defendant in said suit at law, and has full knowledge of the information asked for in said discovery and that she has no other source by which to get said evidence than from said appellant by this bill as aforesaid.

The bill concludes with the prayer that said Orendorff, secretary and treasurer of appellant be directed to answer certain interrogatories therein set out seeking the information requested.

The amended bill is not subject to the criticism that it should contain all the facts tending to support appellee's claim in her suit at law. When a bill is filed purely for discovery in aid of a suit at law, it is sufficient if it is averred therein that the evidence sought will aid the complainant in the suit at law. Robson vs.

Page 4

Doyle 191, Ill. 566.

7-4-552

It is urged that section 9, chapter 51 R. S. providing for the production of books and writings containing evidence pertinent to the issue in any action at law has in effect abrogated the jurisdiction of a court of equity to grant relief by way of bills for discovery. The above mentioned section has no such effect. Garden City Sand Co. vs. People 118, Ill., Ap. 372. This section simply gives to a party to a suit at law additional means of procuring evidence tending to prove the issue presented by him and in the possession of the adverse party and has no tendency to curtail the jurisdiction of a court of equity to entertain a bill for discovery in a proper case. The bill in the case of bar avers that appellant is a large manufacturing corporation with a voluminous and complex system of book-keeping and that appellee has no way of knowing whether the information sought was kept in appellant's regular system of book-keeping or by some other method. The bill in effect charges that appellant is the only one having any knowledge of the accounts in question which are all on one side and about which appellant alone can furnish accurate information. Under these circumstances a court of equity has jurisdiction to order a discovery. Miller vs. Russell 224 Ill. 68.

The decree of the City Court is affirmed.

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CITY OF SPRINGFIELD, Appellee.

vs.

INTER-STATE INDEPENDENT TELEPHONE AND
TELEGRAPH COMPANY, Appellant.**Appeal from Circuit Court**
Sangamon County.

206 I.A. 601

ELDREDGE, J

This is an action in debt brought by the City of Springfield, appellee, against the Interstate Independent Telephone and Telegraph Company, appellant, to recover compensation for rentals alleged to be due for the occupation of portions of the streets and alleys of the city of Springfield during the years 1909 to 1913 inclusive, by poles owned by the defendant. The cause of action is based upon an ordinance alleged to have been passed, August 5, 1901, re-enacted on January 6, 1908, and amended December 27, 1910. The ordinance provides that any person, firm or corporation, owning, controlling or occupying any post or pole over 8 feet high, occupying any portion of any street, alley or sidewalk, used to support electric or other wires, awnings or displays for the purpose of advertising, shall pay annually into the city treasury, the sum of one dollar for each such pole or post, as a remuneration to the

Page 1

city for the use of the portion or portions of the street, alley or sidewalk so occupied. It is conceded that during this period of time appellant maintained 2600 poles on the streets and alleys of the city. To the declaration appellant filed the general issue and three special pleas. A demurrer was sustained to the first special plea and replications were filed to the second and third special pleas. Appellant filed demurrers to the replications which demurrers were overruled by the trial court. Upon the trial the jury found the issues for appellee and fixed the damages at \$13,000. Judgment was entered upon the verdict to reverse which this appeal is prosecuted.

The fundamental issues in this case are identical with those in the case of the City of Springfield vs. Interstate Independent Telephone and Telegraph Co. 201 Ill. App. 227, with the exception that in that case the suit was brought to recover rentals for the year 1914, instead of for the years mentioned in this case. The opinion of this court rendered in the former case must be considered as **res ad judicata** of the same questions involved in this case, and the judgment is therefor reversed.

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266/621

Filed June 11, 1917

387 - 22221

MATHIAS MCCORMACK,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

ATLANTIC TRAIL RAILROAD CO.
OF CHICAGO.

IN REPLYING JUSTICE HENRY
DELIVERED THE ORDER OF THE COURT.

Plaintiff, in a fourth class tort action in the Municipal Court, had judgment for \$150 against the defendant, to reverse which this appeal is prosecuted.

On the 10th of July, 1913, plaintiff, with his horse, had been engaged in the work of hoisting brick and mortar at a building under construction. About 5 o'clock in the evening he prepared to go home, got on the horse's back and rode west on 47th street, in Chicago. At Indiana avenue, a north and south street, he stopped for cars and other vehicles to pass, and when the crossing was clear he again started west. Plaintiff testified that at a point 111 feet west of the easterly building line of Indiana avenue an automobile stood at the curb on the north side of 47th street; that in order to pass by it he turned out to the left, and was "about half way between the automobile" - abreast of it - when a westbound 47th street car belonging to the defendant came from behind and hit the horse, threw it down, broke the harness and threw him on the street.

Three witnesses besides the plaintiff testified in his behalf; no testimony was introduced for the defendant. Two of the witnesses testified that just before the collision the horse shied toward the track and that the car hit the

horse on the side of the neck, causing it to rear up and throw plaintiff from its back. Plaintiff testified that the last time he looked to see if a car was coming from any direction was when he was over on the east side of Indiana avenue, and that at the time of the collision he thought he was about two feet from the north track.

The evidence clearly shows that the car in question had stopped at the east side of Indiana avenue, a transfer point, and had there taken on and discharged a considerable number of passengers, and that as it proceeded westward the motorman had a clear view of the road ahead. Plaintiff's most favorable witness, a passenger on the front platform of the car, stated that the car crossed Indiana avenue at a rapid rate of speed and that this speed was maintained until after the car struck the horse; that at the time plaintiff turned in towards the track the car was about ten feet away and "the next moment the car struck the horse and knocked him (plaintiff) off"; that the car stopped within about forty feet after the collision. This same witness, however, a few days after the accident signed a statement in which it appeared that the car stopped "in about two or three feet after it slid into the horse."

Whether we adopt the theory that the horse chanced onto the track, or that of the plaintiff, as shown by his testimony, that the car struck the horse as it was walking normally alongside the track, there is nothing in the record to establish the charge of negligence on the part of the defendant. There is no evidence that there was not room for plaintiff to pass safely between the automobile and the track without getting into the path of the car, and plaintiff's own testimony would indicate that there was sufficient space

for him to do so. We are of the opinion that the greater weight of the evidence shows that the motorman was operating his car in a manner consistent with the circumstances, and that the accident was the result of the plaintiff permitting his horse to move in the way of the approaching car at a time when it was impossible for the motorman to avoid striking it. In this the plaintiff was guilty of negligence which was the proximate cause of the accident.

The motorman was not required to anticipate or to guard against anything not reasonably to be expected; nor need he have been constantly on guard against unusual or extraordinary occurrences or conduct on the part of others. The rule is that a street railway company "is required to exercise ordinary care, to be measured by the apparent situation and the dangers naturally incident to the business. . . . Where the alleged negligence consisted of an omission of duty suddenly and unexpectedly arising, it is incumbent upon the plaintiff to show that the circumstances were such that the servants of the defendant had an opportunity to become conscious of the facts giving rise to the duty, and a reasonable opportunity to perform it." Booth on Street Railways, 2nd Ed., sec. 305; E. H. L. Co. v. Hawley, 246 Ill. 615; E. H. L. Co. v. Schwartz, 93 Ill. App. 307. See, also, Booth v. E. H. L. Co., 183 Ill. App. 34, and Hall v. E. H. L. Co., 186 Ill. App. 350. Many other cases in support of this principle might be cited.

Other points are presented as grounds for reversal, but in view of our conclusion as above expressed it is unnecessary to pass upon them.

For the reasons indicated the judgment is reversed with a finding of fact.

REVEREND.

The court finds that the defendant, in the operation and management of its car, was not guilty of negligence causing the injuries to plaintiff alleged in his statement of claim herein, but that plaintiff was guilty of negligence proximately contributing to the accident in which such injuries were sustained.

NICHOLAS PLEIMLING,
Appellee,

vs.

PERRY PIPE COMPANY and
JOHN R. PERRY,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

206 I.A. 623

MR. PRESIDING JUSTICE MASURELY

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Perry Pipe Company and John R. Perry, hereinafter called defendants, from a decree entered upon the recommendation of a master in chancery who had been ordered to make an accounting between the parties.

Complainant by his bill alleged that on January 9, 1914, the Pipe Company was indebted to him in the sum of \$6,067.84; that it had no money but had assets which could have been subjected to this payment; that John R. Perry, who was then the president and manager of the company and the owner of a majority of its stock, induced the complainant, in order to save the company, to enter into a contract by which complainant was to accept pipes at the regular wholesale price for the indebtedness due him, upon conditions and provisions named in a contract entered into in pursuance of this agreement; that such contract was made, setting out the indebtedness and the undertaking of the Pipe Company to turn over to the complainant a large stock of their finished product, to be kept in the company's building without expense to complainant, and to fill from this stock all orders for goods received from the states of Michigan, Ohio and Indiana, and to make collections on the same and deposit all moneys received in the name of the complainant, opening a book of ac-

count in his name in which to record all said transactions; the company was to give complainant a statement of all goods billed out and moneys received on the first of each month thereafter; that if any orders should be received from this territory which could not be filled out of said stock of goods which had been sold to complainant, then the company agreed to fill such orders and make an exchange with complainant for a like quantity of the said goods which had been accepted by the complainant as payment of the indebtedness due him. It was specifically agreed that complainant had the exclusive right to sell the product of the company in Indiana, Michigan and Ohio. The contract also included an obligation signed by the defendant John R. Perry, in which he stated that he was the majority stockholder of the corporation and believed that the contract was an advantageous one for the company, and because of his interest and because he had induced the complainant to enter into the contract he personally obligated himself to carry out all of the agreements undertaken by the company in the contract. The complainant alleged that shortly thereafter the defendants breached certain of their undertakings and violated the provisions of the contract in several respects. An answer was filed denying the material allegations of the bill except that the execution of the contract was admitted.

Subsequently the case came on for trial before the chancellor on complainant's amended and supplemental bill and defendants' amended answers thereto, and complainant's replication to the answers, and after hearing evidence and argument a decree was entered by the chancellor on December 24, 1915, finding that the complainant was entitled to the benefit of all orders for goods from every source in the states of Michigan, Indiana and Ohio, and that the defendants

must account to the complainant for all such orders and sales between January 9, 1914, and June 3, 1915, and that the defendants had not given credit to the complainant for such sales or accounted for the same. It was also decreed that the defendants should make a statement of account to the complainant of all the orders received and of all sales made in said territory during said time. There had apparently been an attempt by the defendants to terminate the contract, but the court decreed that such attempted termination was ineffective and void. The court also found by its decree that the defendants had taken certain of the goods belonging to the complainant without payment, and it was decreed that they should account for the same. It was also found that they had taken other goods belonging to the complainant and had substituted certain goods therefor without complainant's consent, and it was ordered that defendants should account for all such goods so taken for which other goods had been substituted. It was also ordered that the matter be referred to William A. Doyle, master in chancery, to make an accounting of such goods.

This decree of December 24, 1915, was not appealed from. The evidence heard by the chancellor upon the trial is not before us in the record. We cannot pass upon the correctness of this decree. In Barnes v. American Brake-Beam Co., 238 Ill. 582, the court said of a similar decree: "A decree which finally settles a controversy and adjusts the rights of the respective parties is final and appealable although questions of accounting remain to be adjusted." This decree construed the contract between the parties and fixed the rights of the respective parties thereto; it was final and appealable as nothing remained except an accounting; there

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having been no appeal we shall not question its propriety. This leaves, therefore, as the only matter for our consideration the correctness of the statement of the account made by the master in chancery and incorporated in the decree of July 21, 1916.

The master's statement is lengthy; the various transactions between the parties with reference to sales, the taking of goods and substitution therefor, are set out minutely in detail. No specific error appears to be pointed out by the defendants with respect to the items contained in the accounting. We shall therefore assume its correctness.

Most of the argument of the defendants is directed towards the original decree, but as we have said heretofore this was a final, appealable decree; as it was not appealed from it cannot now be questioned.

Predicated upon the first decree, the accounting made by the master and the decree entered thereon were justified from the evidence, and the propriety of this latter decree only is now before us. As no convincing reason is presented why it should be changed it will be affirmed.

AFFIRMED.

ANDREW KUTLIK,
Defendant in Error,

vs.

THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

TRANCOR TO SUPERIOR COURT,
COOK COUNTY.

206 I.A. 62

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, while employed by the defendant, received injuries for which he brought suit, and upon trial had a verdict for \$10,000 upon which judgment was entered. Defendant asks that this be reversed.

Plaintiff in two counts of his declaration alleged that he was negligently ordered to do certain work at an unsuitable and dangerous place and also in an improper and dangerous manner.

From the evidence the jury properly could find that Frank Nixon was employed by the defendant as foreman of its wrecking crew which was composed of six men, including the plaintiff; that when this crew was not engaged in clearing up wrecks on the road they worked in defendant's railroad yard; that at the time in question defendant desired to dismantle a flat car which was standing in its yard east of and immediately alongside a platform or scrap dock several hundred feet long; the top of this dock was about on a level with the top of a flat car, and there was a space between the side of the car and the dock of about eight or nine inches. It was the intention of the workmen to raise the body of this car by means of jacks, off ^{of} its trucks, to shove another flat car under the body, and thus load it onto the other flat car. The body of the car which they

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were dismantling was made up of two end sills, two side sills which extended the full length of the car, and several other sills, across which boards were nailed; the side sills were mortised into the end sills; truss rods about an inch and a quarter in diameter extended the length of the car from one end sill to the other; these truss rods could be tightened, and thus each end sill was held firmly in place. When the truss rods were removed there was nothing to hold the end sills firmly.

The couplers and the truss rods had been previously removed from the car in question, and on the morning of the accident the foreman, Nixon, ordered one of the gang named Kuniewski, with his helper, the plaintiff, to take their jacks and complete the work of dismantling the car, and specifically ordered them to jack up the car by placing their jacks under the end sills. Although there is much argument in detail as to whether or not the jacks could be used in any other way, we are of the opinion that the jury was warranted in believing that the only way the car could be jacked up ^{at that place} ~~was~~ by putting the jacks under the end sills. Among the reasons for this was the close proximity of the car to the scrap dock, which would prevent the operation of the jacks at the side; also the unevenness of the ground on either side of the track, and also the small surface of the side sills. In obedience to the foreman's order the two men placed the jacks under the end sills and raised the car, under the foreman's observation. While the north end was jacked up and the men were under the car taking off the iron and timbers the north end sill twisted and pulled partially away from the side sills, permitting the north end of the car to fall down upon the men, with the resulting injuries to the plaintiff complained of.

That the foreman, Nixon, gave the order as above

stated does not seem to be controverted. Neither is there any serious question but that the method of raising the car by placing the jacks under the end sills after the iron trusses had been removed was an improper and dangerous method of doing the work.

Upon the trial, under questioning by counsel for the plaintiff, it was developed that plaintiff was acting as a helper to Kuniewski, the other man working on the car, and it is said that this injected a new issue into the case and negatived the allegation in plaintiff's declaration that these two men were fellow-workmen. We do not think there was any variance in this respect. Plaintiff's case was not predicated upon any improper order of Kuniewski but upon the order of Nixon, the foreman; the evidence does not tend to show that the work was done in the manner suggested because of the order of Kuniewski, but was performed in pursuance of the order of Nixon. No negligence of Kuniewski was either alleged or proven.

Did plaintiff assume the risk, and was he guilty of contributory negligence? The rule is that "where the servant is injured while taking the orders of his master to perform work in a dangerous manner the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it." Offutt v. Columbian Exposition, 175 Ill. 472. Whether or not the danger of doing the work in the manner ordered by the foreman was so apparent and imminent that the plaintiff in the exercise of ordinary prudence should not have incurred it was a question of fact for the jury to determine. While it is clear that the foreman, Nixon, from his years of experience in work of this kind knew of the danger, yet we are unable to say that the jury should have concluded that plaintiff should have been

equally informed. He was a Slav, raised on a farm, and while he had worked as a member of defendant's wrecking crew for some months prior to the accident, he does not seem to have had any special experience which would apprise him of the danger of this particular method of raising the car. There was evidence that he had only worked in and about dismantling cars for about sixty days altogether, and no evidence that he had ever worked on such a car while standing in close proximity to the scrap dock; and while he may have had more or less familiarity with the general work of dismantling cars, we do not find anything in the evidence which would lead to the inevitable conclusion that he knew from observation or experience of the particular danger of the sills twisting in this specific kind of work. The plaintiff's own statement is that he never saw an end sill twist in this way before.

It was not error to permit testimony as to the relations between Kuniewski and the plaintiff with respect to plaintiff receiving orders from him. In whatever Kuniewski may have said to plaintiff as to how the work was to be done, he was merely repeating the instructions of the foreman, Nixon, and testimony as to this was relevant as tending to show that plaintiff in following such instructions was free from contributory negligence.

Complaint is made of instruction No. 1, which we do not think is justified. The criticism assumes that it was an instruction predicated upon a negligent order of Kuniewski; we do not think it would be so understood. The instruction evidently refers to the authority of Nixon, the foreman. The language of the instruction refers to employees authorized "to take charge and control of a certain class of workmen, in carrying on some particular branch of his busi-

ness." This language applies only to Nixon; Kuniewski was not in charge of a class of workmen or of any branch of the business.

We discern no reasonable ground for reversal, and the judgment is affirmed.

AFFIRMED.

413 - 22847

MORRIS CASTY,
Appellee,

vs.

LANZIT CORRUGATED BOX COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2061A 626

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover an amount claimed to be due from the defendant for teaming and hauling goods. Defendant filed an affidavit of defense, with a statement of set-off showing that plaintiff had been overpaid for such services and that there was a balance due the defendant. Upon trial by the court the plaintiff had judgment for \$79.05. Defendant appeals to this court, but plaintiff has not appeared here.

From an examination of the evidence we are of the opinion that the judgment was erroneous and must be reversed. The question involved is simply an accounting between the parties. The plaintiff's books were kept by his son, a boy fifteen years of age, and the evidence is convincing that they were carelessly and inaccurately kept. On the other hand, defendant's books were in proper shape; its payments to plaintiff were proven by checks introduced in evidence. It was abundantly proven that plaintiff's statement failed to show credit items aggregating at least \$125.

The evidence shows that defendant was to pay plaintiff \$22 a week and for extras; that it made payments of \$25 per week, under the belief that this surplus of \$3 took care of the extras. It subsequently developed that the extras did not amount to quite this sum, so that at the time

suit was commenced defendant had overpaid plaintiff the sum of \$45.95. The defendant was entitled to judgment for this amount on its set-off.

The judgment against the defendant will be reversed and judgment will be entered in this court against the plaintiff in favor of the defendant on its set-off for \$45.95.

REVERSED AND JUDGMENT HERE.

420 - 22854

MINNIE E. DONNELLY,
Appellant,

vs.

HUGH B. DONNELLY,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

206 I.A. 627

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a decree denying leave to the complainant, Minnie E. Donnelly, to file an amended bill for separate maintenance, and dismissing her bill for divorce without equity.

The order of events with reference to pleadings was that in October, 1911, the complainant filed her bill for separate maintenance, averring repeated acts of cruelty, to which defendant filed an answer. In May, 1914, by leave of court, complainant filed her amended bill asking for a decree of divorce, which bill contained substantially the same allegations set out in the bill for separate maintenance. Defendant answered this bill. Defendant filed a cross-bill alleging desertion on the part of complainant, which complainant answered denying the alleged desertion. Subsequently, in March, 1916, complainant desiring to abandon her petition for divorce, asked leave of court to file an amended bill for separate maintenance, which bill contained substantially the same allegations set out in the original bill for separate maintenance and the amended bill for divorce, which said motion was overruled and denied.

The cause came on for hearing upon the bill for divorce and defendant's cross-bill alleging desertion. Before

the taking of testimony the motion for leave to file the amended bill for separate maintenance was renewed, and the court reserved its ruling thereon until the evidence was heard. After hearing the court dismissed complainant's amended bill for divorce and also defendant's cross-bill.

From the order dismissing the bill and denying her motion to file her amended bill for separate maintenance complainant has appealed to this court; no appeal has been taken from the decree dismissing defendant's cross-bill.

We are of the opinion that the chancellor was in error in denying the complainant leave to file her amended bill for separate maintenance. Upon the hearing she gave as her reason for desiring to withdraw her petition for divorce that she feared it would discredit their child to have it known that his parents were divorced. It was her right, if for any reason she did not wish for a divorce, to withdraw her bill to that end, and we can see no substantial reason why her motion should not have been allowed.

Without narrating the evidence in detail, we are of the opinion that it is ample to sustain a decree for separate maintenance. Repeated acts of physical violence inflicted upon complainant by her husband were proven. The case made out by the proof falls precisely within the terms of the statute on separate maintenance, where it is provided that a married woman who without her fault lives separate and apart from her husband may have her remedy in equity for reasonable support and maintenance. If her amended petition had been allowed and an issue made thereon by answer, under the evidence a decree as prayed for in the bill should have been entered.

Counsel for complainant here asserts that as the evidence heard under complainant's bill for divorce was suffi-

cient to warrant the entry of a decree of separate maintenance, this court may direct such a decree to be entered under the prayer of the bill for general relief. We should be entirely willing to direct the entry of such a decree if we had the power so to do, but a bill seeking a divorce and a bill seeking separate maintenance are separate and distinct proceedings brought under different statutes. We are referred to no case where it has been held that the court may grant one of these remedies in a proceeding brought specifically to secure the other remedy.

The decree dismissing complainant's bill for want of equity and the order denying complainant leave to file her amended bill for separate maintenance will be reversed and the cause remanded with directions to permit such an amended bill to be filed, and for further proceedings not inconsistent with our views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

C. F. SMITH, HUGO SONNENSCHNIG
and EDWARD SONNENSCHNIG, Trustees
of the Estate of Rudolph J. Busch,
deceased.

Appellees,

vs.

SIDNEY McBOWE,

Appellant.

2051 A. 695
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE MCGURLEY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit in an action in forcible
detainer, and on trial the court instructed the jury to
find against the defendant. From the judgment entered on
this finding defendant appeals.

The facts are that in January, 1911, Rudolph J.
Busch, since deceased, and Frans Robert Ryd entered into a
contract whereby Busch agreed to sell to Ryd the premises
in question for \$3,750, \$100 to be paid at the time of the
execution of the contract and \$30 upon the 15th day of each
and every month thereafter, payable at the office of the
said Busch. After a certain amount was paid Busch agreed to
give a warranty deed. Said contract also provided that no
transfer or assignment thereof should be made by Ryd without
the written consent of Busch, and that no subsequent assign-
ment should be made without such written consent. There-
after Busch died, and plaintiffs are said to be the trust-
ees of his estate.

From the abstract before us it appears that there
were introduced in evidence in addition to this contract the
following documents:

*Assignment of above contract by Frans Robert

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Ryd and Ella M. Ryd to George and Erma Watrous, and consent of trustees, Nov. 25, 1914.

Assignment of above contract from George and Erma Watrous to Walter K. Radcliffe and consent of trustees, January 23, 1915.

Assignment of above contract from Walter K. Radcliffe to Jennie M. Bronell, August 30, 1915.

Assignment of above contract from Jennie M. Bronell and Charles B. Bronell to Helma M. McBowe and Sidney McBowe, Sept. 1, 1915.

Consent of trustees to transfer and assignment of foregoing contract from Walter K. Radcliffe to Jennie M. Bronell and from Jennie M. Bronell to Helma McBowe and Sidney McBowe."

There is no question of failure on the part of any of these assignees to make the payments called for by the contract. This being the state of the record, we fail to see any reason for the peremptory instruction to the jury to find against the defendant. He seems to have been in lawful and peaceable possession of the premises and was not in default in any of the terms of the contract.

The argument of respective counsel centers around the authority of the attorney for the trustees to give the written consent to the assignments to the defendant and his wife. However this may be, subsequent thereto and after defendant had entered into possession, plaintiffs received from him a payment of the installment due on the contract, thus ratifying the action of the attorney, even if there should have been any question as to his authority.

We can see no reason in law or justice permitting this judgment to stand, and it therefore will be reversed.

REVEREND.

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Illinois App. Unpublished Ops.

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| 8/17 | W. J. J. J. J. | 897-1826 |
| OCT 7 | W. J. J. J. J. | 176-6431 |
| 10-5-61 | W. J. J. J. J. | 5-23804 |
| | W. J. J. J. J. | 7-16-2100 |
| | W. J. J. J. J. | 176-7000 |
| | M. S. J. J. J. | 332-5300 |
| 1/5/70 | S. J. J. J. J. | AN-3-1131 |

